Supreme Court, U.S.
FILED
APR 2 - 2010
OFFICE OF THE CLERK

No. 09-1057

IN THE

# Supreme Court of the United States

LARS P. E. BILDMAN,
*Petitioner*,

v.

ASTRA USA, INC.,
*Respondent.*

**On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JEFFREY S. ROBBINS
A. W. PHINNEY, III*
JOSEPH D. LIPCHITZ
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C
One Financial Center
Boston, MA 02111
(617) 542-6000
AWPhinney@mintz.com

**Counsel of Record for Respondent*

April 2, 2010

WILSON-EPES PRINTING CO , INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTIONS PRESENTED

1. Whether the Massachusetts Supreme Judicial Court erred in applying this Court's precedent to the record in this case and ruling that Petitioner, the former Chief Executive Officer of a major pharmaceutical company who had first assembled a team of public relations consultants to manage an emerging *BusinessWeek* cover story about his misconduct and then, after publication of the *BusinessWeek* story and widespread media stories about former employees' public allegations against him and an EEOC investigation, contacted media outlets to comment on the controversy, qualified as a limited purpose public figure with respect to this matter.

2. Whether by failing to raise his argument that corporations are not entitled to First Amendment protection in the Massachusetts courts, Petitioner has waived his right to raise that argument here, and whether, even if not waived, his argument is erroneous.

3. Whether, even if the Supreme Judicial Court had erred in applying this Court's limited purpose public figure precedent to the record before it, there were adequate and independent state grounds under Massachusetts law for the judgment in favor of Respondent on Petitioner's negligent libel claims.

## PARTIES TO THE PROCEEDING

The Petitioner in this case is Lars P.E. Bildman, who was Astra USA, Inc.'s President and Chief Executive Officer from 1981 until his termination in 1996. The Respondent is Astra USA, Inc. ("Astra"), which at all relevant times during the underlying litigation was a wholly-owned American subsidiary of Astra AB, a Swedish publicly-traded company.

Although Bildman brought claims in the trial court against Astra AB and two of its corporate officers, as well as Astra, the trial court dismissed Astra AB as a party before summary judgment for lack of personal jurisdiction. The two officers were Dr. Haken Mogren and Carl-Gustaf Johansson, who were also members of Astra's Board of Directors. Bildman sued them for libel and tortious interference with contractual relations. The trial court dismissed the libel claims against Mogren and Johansson at summary judgment. At trial, the jury found in favor of Mogren and Johansson on Bildman's tortious interference claims.

In his Amended Notice of Appeal dated October 24, 2007, which was filed with the Massachusetts Appeals Court, Bildman withdrew his appeal of the various rulings and judgments in favor of Astra AB, Mogren and Johansson. As a result, only Astra and Bildman were parties to the appeal before the Massachusetts Supreme Judicial Court and are the only parties before this Court.

## CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent Astra USA, Inc. states that it is a wholly-owned subsidiary of AstraZeneca Treasury Limited, which is, in turn, owned by AstraZeneca UK Limited, a subsidiary of AstraZeneca Intermediate Holdings Limited. AstraZeneca PLC, a publicly-traded company, owns AstraZeneca Intermediate Holdings Limited and, through the subsidiaries identified above, indirectly controls more than 10% of the stock of Astra USA, Inc.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| CORPORATE DISCLOSURE STATEMENT | iii |
| TABLE OF AUTHORITIES | viii |
| STATEMENT OF THE CASE | 3 |
| *BusinessWeek* Investigates Allegations That Bildman Had Sexually Harassed Astra Employees | 5 |
| Bildman Assembles A Media "Task Force" In December 1995 | 5 |
| In April 1996, Bildman Directs His Task Force To Meet With *BusinessWeek* To Influence The Emerging Story | 6 |
| Astra Suspends Bildman And Begins Its Own Investigation | 7 |
| After Bildman's Suspension, Numerous Media Articles Are Published Concerning Bildman's Suspension And The Numerous Public Lawsuits That Had Been Filed Alleging Sexual Harassment By Bildman | 8 |
| Before The *BusinessWeek* Publication, Bildman Actively Communicates With The Media To Influence The Public Controversy | 8 |
| The Publication Of "Abuse Of Power" Generates Media Stories To Which Bildman Responds, As Well As An EEOC Investigation | 9 |

TABLE OF CONTENTS—Continued

Page

Astra's Internal Investigation Reveals Extensive Misconduct By Bildman Leading To His Termination For Cause ..... 12

Astra Commences The Underlying Lawsuit Against Bildman, And Bildman Counterclaims, Inter Alia, For "Negligent Libel" ..... 13

The SJC Affirms The Trial Court's Grant Of Summary Judgment On Bildman's Negligent Libel Claim ..... 14

ARGUMENT ..... 15

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE SJC PROPERLY STATED AND APPLIED THIS COURT'S PRECEDENT IN HOLDING THAT BILDMAN WAS A LIMITED PURPOSE PUBLIC FIGURE. ..... 15

II. THIS CASE DOES NOT MERIT REVIEW BECAUSE BILDMAN'S CONTENTION THAT THE FIRST AMENDMENT DOES NOT PROTECT ASTRA (1) HAS BEEN WAIVED AND (2) IS ERRONEOUS. ..... 24

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THERE ARE TWO ADEQUATE AND INDEPENDENT STATE GROUNDS UNDER MASSACHUSETTS LAW FOR THE SJC'S REJECTION OF BILDMAN'S NEGLIGENT LIBEL CLAIMS. ..... 26

TABLE OF CONTENTS—Continued

Page

A. The Jury's Answers To Special Questions Established Astra's Conditional Privilege To Comment On Its Investigation Into Its Former CEO's Misconduct, And Imposed An Independent Burden On Bildman To Adduce The Requisite Evidence Of Actual Malice. ..... 29

B. The Jury Verdict And Its Answers To Special Questions Also Established The Substantial Truth Of Astra's Purportedly Actionable Statements. ..... 32

CONCLUSION ..... 36

APPENDIX ..... 37

APPENDIX A: Memorandum Of Decision And Order On Parties' Motions For Summary Judgment, dated October 29, 2001 .... 1a

APPENDIX B: Suffolk Superior Court Special Question Verdict Form, dated February 21, 2002 ..... 102a

APPENDIX C: Final Judgment After Rescript, dated January 6, 2010 ..... 109a

# TABLE OF AUTHORITIES

CASES Page

*Astra USA, Inc. v. Bildman*, 455 Mass. 116, 914 N.E. 2d 36 (2009) .....*passim*

*Bratt v. International Business Machines Corp.*, 392 Mass. 508 (1984) .....28, 29

*Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582 (2007) ..... 32

*Broomes v. Blue Cross Blue Shield of Massachusetts, Inc.*, 74 Mass. App. Ct. 1123, 2009 WL 1953006 (Mass. App. Ct. July 9, 2009) ..... 29

*Citizens United v. Federal Election Commission*, —U.S.—, 130 S.Ct. 876 (2010)... 25

*Dragonas v. School Committee of Melrose*, 64 Mass. App. Ct. 429 (2005)..... 30

*First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)..... 25

*Florida v. Powell*, —U.S.—, 130 S.Ct. 1195 (2010)..... 27

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).....2, 13, 15, 16, 20, 21, 23

*Gray v. St. Martin's Press, Inc.*, 221 F.3d 243 (1st Cir. 2000)..... 18

*Herb v. Pitcairn*, 324 U.S. 117 (1945)..... 27

*Hutchinson v. Proxmire*, 443 U.S. 111 (1979).....21, 22, 23, 27, 35

*Kyle v. Mongan*, 72 Mass. App. Ct. 1111, 2008 WL 2951800 (Mass. App. Ct. Aug. 4, 2008)..... 29, 30

TABLE OF AUTHORITIES—Continued

Page

*Lazzara v. Wyle Electronics Co.*, 56 Mass. App. Ct. 1112, 2002 WL 3169483 (Mass. App. Ct. 2002) ..... 24

*Mason v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) ..... 33

*Michigan v. Long*, 463 U.S. 1032 (1983) ..... 26, 27

*Plucket v. United States*, —U.S.—, 129 S.Ct. 1423 (2009) ..... 24

*Reilly v. Associated Press*, 59 Mass. App. Ct. 764 (2003) ..... 33

*Sklar v. Beth Israel Deaconess Medical Center*, 59 Mass. App. Ct. 550 (2003) ..... 30

*Time, Inc. v. Firestone*, 424 U.S. 448 (1976) ..... 20, 22, 23

*Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150 (1971) ..... 19

*Wolston v. Readers Digest Association*, 443 U.S. 157 (1979) ..... 20, 21, 22, 27

*Zortman v. Bildman*, 1999 WL 1318959 (Mass. Super. Ct. Jan. 15, 1999) ..... 9

CONSTITUTION

U.S. Const. Amend. I ..... 2, 4, 25

RULES

Sup. Ct. R. 10 ..... 2, 15

Sup. Ct. R. 15 ..... 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, *Supreme Court Practice* (9th ed. 2007) ..... 26

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393 (1960) ..... 26

IN THE

# Supreme Court of the United States

No. 09-1057

LARS P. E. BILDMAN,
*Petitioner,*

v.

ASTRA USA, INC.,
*Respondent.*

**On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, Astra opposes Bildman's petition for a writ of certiorari. Bildman seeks to have this Court review the Massachusetts Supreme Judicial Court's decision, published as *Astra USA, Inc. v. Bildman*, 455 Mass. 116 (2009), which affirmed the trial court's grant of summary judgment dismissing Bildman's negligent libel claims against Astra. Bildman's libel claims were based on statements made by Astra concerning its investigation into Bildman's misconduct as its CEO after *BusinessWeek* published a cover story about allegations that Bildman had sexually harassed numerous female employees.

The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial court's ruling that Bildman was a limited purpose public figure at the time of Astra's statements under the standard articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that he had failed to sustain his burden at summary judgment of adducing evidence sufficient to satisfy the actual malice standard imposed on such plaintiffs. Bildman did not below, and does not here, challenge the trial court's ruling that he had failed to adduce evidence of actual malice, but rather confines his appeal to the SJC's ruling that he was a limited purpose public figure.

Bildman's petition should be denied based on four separate grounds, each of which demonstrates that there is no compelling reason to justify review of this matter. *See* S. Ct. R. 10. First, Bildman's petition rests on the alleged misapplication of the properly-stated rule of law governing limited purpose public figures. *Id.* (a "petition...is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law").

Second, the SJC in fact properly applied this Court's precedent in holding that Bildman was a limited purpose public figure on the record in this case. Third, Bildman has waived his contention that the First Amendment's protections do not extend to corporations, which, in any event, is without merit. Fourth, there exist two adequate and independent state grounds under Massachusetts law that fully support the SJC's decision affirming the dismissal of Bildman's negligent libel claims.

## STATEMENT OF THE CASE

On February 21, 2002, a Massachusetts jury returned a special verdict answering the Court's twenty-five (25) special questions, doing so in Astra's favor in the case of all but one. It found that Bildman, while Astra's President and CEO, had committed fraud, waste, conversion of Astra's assets and breaches of his fiduciary duty to Astra, and that he had also engaged in sexual harassment of, and improper retaliation against, Astra employees. The jury also upheld Astra's 1996 termination of Bildman for cause. It awarded Astra a total of $1,040,842 in damages.[1] *See* R5658; R6680.

Astra adopts and incorporates by reference the factual summary contained in the SJC's opinion (hereinafter "the SJC decision") at 455 Mass. 116, 119-127, 914 N.E. 2d 36, 40-45 (2009). The SJC's factual summary was based "on the evidence presented to the jury and the judge's findings on the remainder, which we supplement with uncontroverted material from the record." *Id.* at 119.[2]

Because Bildman did not challenge the jury verdict in Astra's favor on appeal, and does not here challenge any aspect of the SJC decision except that which upheld summary judgment in Astra's favor on Bildman's negligent libel claims, Astra summarizes herein only that portion of the record most germane to Bildman's petition, which is confined to one issue

---

[1] The jury also found that Bildman was entitled to a stock grant in the amount of $203,691, which amount was subsequently set off against Astra's verdict. *Astra USA, Inc. v. Bildman*, 455 Mass. 116, 117-118 (2009).

[2] References to the record before the SJC are cited herein as "R___."

determined by the trial court in entering summary judgment for Astra on those claims. That issue is whether the SJC properly applied this Court's precedent on when a defamation plaintiff qualifies as a limited purpose public figure to the record before it.[3]

Astra also sets forth the factual background germane to the question of whether, even if Bildman was *not* a limited purpose public figure consistent with this Court's precedent, judgment in Astra's favor was supported in any event under two (2) adequate and independent state grounds under Massachusetts law.

As the SJC stated, Astra is incorporated in New York.[4] During the relevant period of this litigation,

---

[3] In his petition, Bildman casts himself as a whistleblower and asserts that the "nexus of the conflict" between Astra and himself was his "disapproval of [Astra AB's] actions in disregard of F.D.A. rules," including asserting that Astra AB concealed from the F.D.A. "severe fetus defects in a pregnant monkey on a drug Petitioner was preparing." (Pet. Br. at 5-6). Such an allegation finds no support in the record. Indeed, any assertion that Bildman was terminated for any reason other than his own misconduct was expressly rejected by the jury in its answers to special verdict questions. *See* R5658-5664. Moreover, Bildman's unsubstantiated assertions are not related in any way to the four (4) alleged libels that are the subject of the SJC's decision or his petition before this Court.

[4] *Astra*, 455 Mass. at 119. Bildman never contended that Astra USA is a foreign corporation, which it is not. Thus, the entire premise of one of Bildman's two grounds for seeking review by this Court; namely, that the First Amendment does not protect "a *foreign* multi-national drug company" is misplaced. *See* Pet. Br. at p.i—Questions Presented And Reasons For Granting The Petition; pp. 21, 23 ("The protection of and support of *foreign* non-media companies' intervention in the U.S. legal system circumventing the U.S. rule to try cases inside the courts is bound to severely damage the U.S. trial process"); and pp. 24-25 ("the lower court's vesting in a non-media *foreign*

Astra's principal place of business was Westborough, Massachusetts.

### *BusinessWeek* Investigates Allegations That Bildman Had Sexually Harassed Astra Employees

In December 1995, Bildman learned that a *BusinessWeek* reporter named Mark Maremont was conducting an investigation into allegations by current and former Astra employees that he and senior management at Astra had engaged in sexual harassment. Indeed, over the prior decade Bildman had received numerous complaints from Astra employees about his own conduct and that of his direct reports. Bildman had in fact authorized the payment of several hundred thousand dollars of Astra funds to settle demands or claims made by female employees who asserted that he had coerced them into unwanted sexual relations, made sexually inappropriate comments, kissed or attempted to kiss them, touched their necks and buttocks, and danced with them in a sexually provocative way. Each of the settlement agreements obtained at Bildman's direction contained confidentiality provisions. Bildman did not disclose to Astra's Board of Directors that Astra, under his management, had a sexual harassment problem. *Astra*, 455 Mass. at 120-122.

### Bildman Assembles A Media "Task Force" In December 1995

Upon learning that *BusinessWeek* was conducting an investigation into sexual harassment by him and his senior managers, and knowing of his own conduct,

---

corporate defamation defendant...such protection and support of *foreign* influence cannot be read into the language of the First Amendment...") (emphasis supplied).

and, *inter alia*, of the settlements he had authorized to resolve claims and demands centered on his own conduct, Bildman in December 1995 created what he termed a "task force" consisting of public relations consultants and attorneys in order "to determine *BusinessWeek*'s sources of information and to control the flow of information to *BusinessWeek* and Astra AB." *Id.* at 121; R576.

In January 1996, shortly after learning of the *BusinessWeek* investigation, Bildman authorized a new payment of $100,000 in Astra's funds to another female employee to settle her sexual harassment claims against him. *Astra*, 455 Mass. at 121.

**In April 1996, Bildman Directs His Task Force To Meet With *BusinessWeek* To Influence The Emerging Story**

On April 16, 1996, *BusinessWeek* wrote a letter to Astra asking to speak with Bildman about "serious allegations of sexual harassment" at Astra, including by Bildman. Bildman directed Astra's General Counsel to send a letter to *BusinessWeek* denying the allegations and offering to meet with *BusinessWeek* if it provided more details to Astra. *BusinessWeek* thereafter provided a seven-page letter to Astra AB on April 18, 1996 further detailing the allegations of sexual harassment against Bildman. *Id.* at 121-122.

Once Bildman knew that *BusinessWeek* had provided Astra's parent with detailed allegations against him, he "decided, at Maremont's request, to arrange a meeting with Maremont and *BusinessWeek* magazine at Astra USA headquarters [on April 22, 1996] ... to rebut the allegations contained in the April 18, 1996 letter." R580; *Astra*, 455 Mass. at 122-123. Bildman's task force informed him that, as a result of its

meeting with Maremont, *BusinessWeek* would not immediately publish the story. R581-582.

Bildman also attempted to influence the brewing controversy internally at Astra. "[F]rom December, 1995 through March, 1996, Bildman apparently also [had] orchestrated a campaign to direct female and minority Astra employees to write letters of support for him to Astra AB." *Astra,* 455 Mass. at 122, n.11. Bildman assured Astra AB that Astra had nothing "to be ashamed of" and had a "good record concerning sexual harassment." *Id.* at 122.

**Astra Suspends Bildman And Begins Its Own Investigation**

Upon receiving *BusinessWeek's* detailed letter, Astra AB sent Johansson, Astra AB's General Counsel, Goran Lerenius, and Thomas Clauss, Jr., a partner in the law firm of Winthrop, Stimson, Putnam & Roberts ("Winthrop Stimson") to Astra's headquarters to conduct an initial investigation. On April 28, 2006, Astra's Board of Directors, after having interviewed Astra employees, including Bildman, about the *BusinessWeek* allegations, voted unanimously to suspend Bildman with pay, to create a special committee to investigate allegations of sexual harassment and other improprieties and report its findings to the Board, and to retain Winthrop Stimson to conduct a full investigation. *Id.* at 123.

**After Bildman's Suspension, Numerous Media Articles Are Published Concerning Bildman's Suspension And The Numerous Public Lawsuits That Had Been Filed Alleging Sexual Harassment By Bildman**

On April 30, 1996, the *Boston Globe* published an article about Bildman's suspension. *Boston Globe*, "Astra Chief Suspended After Harassment Charge: Westborough Firm to Probe Employee Allegations", 1996 WLNR 2200474 (April 30, 1995). It reported that Bildman's suspension came "on the heels of recent allegations of sexual harassment at Mitsubishi" to the effect that up to 500 female Mitsubishi workers were subjected to "groping, demands for sex and sexually explicit drawings." *Id.* The *Boston Herald* and *Worcester Telegram & Gazette* also published stories on the sexual harassment allegations against Bildman on April 30, 1996. *See* 1996 WLNR 252282 and 1996 WLNR 5869843.

The next day, May 1, 1996, the *Boston Globe* published an article entitled "Suit Alleges a Wild-Party Tone At Astra" about a new lawsuit filed by a former Astra employee against the company. R875-877. It reported that this lawsuit was the sixteenth sexual discrimination and/or harassment action brought against Astra or its executives by present or former employees, and quoted a Commissioner of the Massachusetts Commission Against Discrimination as stating that this was an "unusually large number." *Id.*

**Before The *BusinessWeek* Publication, Bildman Actively Communicates With The Media To Influence The Public Controversy**

As of May 1, 1996, the *BusinessWeek* story had not yet been published. On May 1st, the same day as the

front page *Boston Globe* story on the most recent lawsuit against Astra, Bildman once again took affirmative steps to influence the *BusinessWeek* story before its publication. His personal counsel sent two letters to the *BusinessWeek* reporter, Mark Maremont. The first referred to a conversation between Bildman's counsel and Maremont earlier that day, in which Bildman's counsel requested the opportunity to address the allegations prior to the story's publication. R707-08. The second letter contained a "Statement of Lars Bildman" responding to the allegations contained in Maremont's letter. *See* R712-713.

**The Publication Of "Abuse Of Power" Generates Media Stories To Which Bildman Responds, As Well As An EEOC Investigation**

The next day, May 2, 1996, *BusinessWeek* published a cover story entitled "Abuse of Power: The Astonishing Tale of Sexual Harassment at Astra USA."[5] *BusinessWeek* reported that it had interviewed more than 70 former and current employees and found "a disturbing pattern of complaints during much of Bildman's 15-year tenure, including a dozen cases of women who claimed they were either fondled or solicited for sexual favors by Bildman or other Astra executives." *Astra*, 455 Mass. at 125.

---

[5] The article itself is dated May 13, 1996, but the record shows that the issue in which the article appeared was published on May 2, 1996. R911 at ¶6; *Zortman v. Bildman*, 1999 WL 1318959, *4 (Jan. 15, 1999) (Hinkle, J.) ("On May 2, 1996, *Business Week* published as its cover story an article by Maremont entitled "Abuse of Power").

The undisputed record on summary judgment was that the cover story generated both local and international media coverage, and that during May and June, 1996 alone, over one hundred and fifty articles concerning Bildman and Astra were published throughout the world. *Id.* at 124; R1027.

In his petition, Bildman asserts that *Astra* "approved the publication of the *BusinessWeek* article after the magazine's editorial board had turned it down." Bildman then contends that the "court below left this fact unnoticed." (Pet. Br. at 6 and n.3). There is no evidentiary support for this assertion.[6]

After the *BusinessWeek* article was published on May 2, 1996, Bildman continued to actively contact and interact with the media. As the SJC found:

> The judge found that Bildman, through counsel, repeatedly contacted and used the media, including *BusinessWeek*, the *Boston Globe*, and the *Boston Herald*, to comment on the investigation, deny and rebut Astra's allegations, and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets, including the *New York Times*, *Wall Street Journal*, Reuters, United Press, New England Cable News, CBS News, WCVB-TV, WLVI-TV, and WHDH-TV in Boston. Bildman also entered into unsuccessful

---

[6] Indeed, the record citation that Bildman provides the Court for this assertion is merely his Amended Counterclaim and Third-Party Complaint. However, even that document fails to allege that Astra in any way "approved the publication" of the *BusinessWeek* article, which was, of course, highly critical of Astra. *See* R581-582.

> negotiations with CBS News to be interviewed on its evening news program in New York and appeared in an interview on a Swedish television program.

*Astra*, 455 Mass. at 145, n.44; R1026-1030.

Media reports on the controversy also contained Bildman's counsel's extensive comments on it. On May 20, 1996, *BusinessWeek* published a follow-up article entitled "Aftershocks Are Rumbling Through Astra: An EEOC Sexual Harassment Probe Could Be In The Works." That article quoted Bildman's counsel as stating that "there is nothing independent about the investigation and the results have been predetermined." R725. Commenting on a lawsuit filed by former Astra employees asserting that Bildman had "covered-up" allegations of sexual abuse, Bildman's counsel was quoted in a *Boston Herald* article, entitled "Six Former Astra Workers File Sex Suit" and published on May 31, 1996, as saying "This is the most reprehensible piece of drivel I've ever seen in 17 years of practicing law.... I can't believe an attorney licensed to practice law in the Commonwealth would even file it." R727.

In a June 3, 1996 letter to the Producer of CBS Evening News, Bildman's counsel wrote: "I am looking forward to hearing from you further with respect to my request that I be given the opportunity to respond on camera to the allegations which have been made against my client." R745. In a press release dated June 4, 1996 issued through his counsel, Bildman stated: "Since the beginning of this case, I and my family have been outraged at the irresponsible allegations that have been made against me." R783. In a June 13, 1996 letter to CBS News, Bildman's counsel wrote on Bildman's behalf: "He has authorized me to

speak for him and I am requesting the opportunity to go on-camera to respond to the allegations set forth in your letter of June 12th." R797.

The Equal Employment Opportunity Commission ("EEOC") also initiated an investigation in May 1996 into the allegations of sexual harassment at Astra. R721-722, 724. In February 1998, the EEOC filed its formal complaint against Astra alleging a pattern and practice of sexual harassment of Astra employees since "at least January 1, 1993 and continuing." *Astra*, 455 Mass. at 124-125. Astra entered into a consent decree with the EEOC, which established a $9,850,000 fund to compensate victims of sexual harassment at the company. *Id.*

**Astra's Internal Investigation Reveals Extensive Misconduct By Bildman Leading To His Termination For Cause**

Winthrop Stimson's two-month investigation uncovered "evidence of pervasive sexual harassment of female Astra employees by Bildman and others in management," evidence that Bildman had threatened employees who spoke to investigators, destroyed and/or ordered the destruction of company documents, and "evidence of...serious financial and other improprieties."[7] *Astra*, 455 Mass. at 123-124, n.13. On June 25, 1996, Astra's Board of Directors voted to terminate Bildman's employment for cause. *Id.*

---

[7] In March 1997, Bildman was indicted for various felonies relating to the conduct in question and, in January 1998, he pleaded guilty to three counts of willfully filing false federal tax returns. *Id.* at 125, n.15. Both Bildman's indictment and his subsequent guilty plea received considerable media attention. *See* R899-909.

## Astra Commences The Underlying Lawsuit Against Bildman, And Bildman Counterclaims, *Inter Alia*, For "Negligent Libel"

In February 1998, Astra commenced the underlying lawsuit against Bildman for fraud, conversion, waste and breaches of his fiduciary duties. Bildman responded by suing Astra and two of its Board members, Mogren and Johansson, *inter alia*, for tortious interference with his employment agreement and for libel. Prior to trial, the judge granted Astra's summary judgment motion on all of Bildman's libel claims, applying this Court's analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to find that Bildman was a limited purpose public figure and that, quite apart from whether the statements in question were true, Bildman had not adduced the requisite evidence of actual malice to survive summary judgment.[8]

After a seven week trial, a jury found Bildman liable to Astra for fraud, conversion, waste and breach of fiduciary duty by "making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose," and for "improper use of Astra funds." The jury also found that Bildman engaged in sexual harassment of Astra employees, that he retaliated against Astra employees who had exercised their rights to make complaints under Astra's sexual harassment policy and that he had violated Astra's sexual harassment policy. *Astra*, 455 Mass. at 126.

---

[8] At summary judgment, the trial court found that close to ten purportedly defamatory statements were either true or non-defamatory as a matter of law. Bildman did not appeal these findings or the trial court's dismissal of his "malicious libel" or "libel per se" claims. *Astra*, 455 Mass. at 144, n.42.

The jury found that in terminating its employment agreement with Bildman for cause Astra had not breached that agreement, and that Mogren and Johansson had not interfered with Bildman's employment agreement. In answering a special question about the reasonableness of Astra's conduct, the jury found that "[a]t the time Astra terminated Mr. Bildman, [ ] Astra [had] a reasonable good faith basis for believing Mr. Bildman had engaged in conduct justifying his termination 'for cause' under the 1993 employment contract." R5662.

The jury found that Bildman was liable to Astra for fraud, conversion, corporate waste, and breaches of his fiduciary duties. *Astra*, 455 Mass. at 117-118.

The trial court reserved Astra's claim for forfeiture of the compensation paid to Bildman during the period of his disloyalty, ultimately ordered a bench trial on that issue, and found that notwithstanding the strict forfeiture law under the law of New York where Astra was incorporated, Astra was not entitled to forfeiture.

The parties each appealed certain issues to the Massachusetts Appeals Court; the SJC, *sua sponte*, took the matter for direct review.

## The SJC Affirms The Trial Court's Grant Of Summary Judgment On Bildman's Negligent Libel Claim

In his appeal, Bildman did not challenge the jury verdict against him. Rather, he confined his appeal to the trial court's denial of his bid for legal fees under the employment agreement and its grant of summary judgment on his libel claims. His appeal of the summary judgment was limited to the trial

court's determination that he was a limited purpose public figure; he did not challenge the trial court's determination that he had failed to adduce the requisite evidence of actual malice.

The SJC held that Astra was entitled to forfeiture of Bildman's compensation during the period of his disloyalty, and upheld the trial court's grant of summary judgment for Astra on Bildman's defamation claims, applying the rule set forth in *Gertz* and holding that, under the circumstances of this case and based on the undisputed record, Bildman did indeed qualify as a limited purpose public figure.

## ARGUMENT

### I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE SJC PROPERLY STATED AND APPLIED THIS COURT'S PRECEDENT IN HOLDING THAT BILDMAN WAS A LIMITED PURPOSE PUBLIC FIGURE.

In his Petition, Bildman concedes that the SJC properly stated the legal standard under *Gertz* in determining when an individual becomes a limited purpose public figure, but contends that it then "ignored all instructions in *Gertz* and its progeny as to the existence of a public controversy and the characteristics of a limited purpose public figure." (Pet. Br. at p.9). Bildman's challenge to the application of a properly-stated rule of law to the record is precisely the type of petition that this Court's Rules indicate rarely justifies review. *See* S. Ct. R. 10.

Not only did the SJC properly state the applicable legal standard for determining whether an individual is a limited purpose public figure, the SJC's decision is entirely faithful to and consistent with the

*Gertz* holding that extended public figure status to those who "have brought themselves to the forefront of particular controversies in order to influence the resolution of the issues involved" and who, therefore, have "invite[d] attention and comment." *Gertz*, 418 U.S. at 345. The SJC properly applied that standard to hold that Bildman was a limited purpose public figure as of the time of the four (4) purportedly actionable statements that were made by Astra on May 3, 1996, May 13, 1996, June 26, 1996 and February 5, 1998. *See Astra*, 455 Mass. at 143, n.42 ("The judge determined as to most of [the alleged defamatory statements] that they were either true or nondefamatory as a matter of law").[9]

As the statement of the case demonstrates, by May 3, 1996, the earliest of those dates, Bildman had

---

[9] As discussed *infra*, these four statements were: (1) a May 3, 1996, article in the *Wall Street Journal* in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the *BusinessWeek* investigation; (2) a speech Mogren gave to Astra employees on May 13, 1996, in which he stated: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened"; (3) a June 26, 1996 Astra news release and press release that made identical statements that Bildman "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and (4) an Astra statement appearing in the February 5, 1998 *Boston Globe*, after Astra's settlement with the EEOC, that Bildman's "actions-asking people to destroy records and the like-are in our estimation an attempt to cover up and keep things from his superiors in the company." *Astra*, 455 Mass. at 143, n.42.

*already* engaged in extensive communications with the media in an effort to influence how they portrayed him in the emerging controversy that centered on his conduct as CEO. Indeed, five (5) months earlier, Bildman had assembled a public relations team for the purpose of influencing the publication of the emerging *BusinessWeek* story prior to its publication. Then, in April 1996, Bildman had orchestrated a meeting of his "task force" with the *BusinessWeek* reporter in order to influence the story shortly before its publication.

In addition, on May 1st, after he was suspended but the day before the *BusinessWeek* story was published, Bildman had his counsel speak with the *BusinessWeek* reporter to see if he could affect its content, and then faxed the reporter a "Statement of Lars Bildman." On that day, Bildman was *already* the subject of *Boston Globe* and *Boston Herald* stories relating to sexual harassment allegations against him by former Astra employees. By the next day, May 2, 1996, Bildman was also the subject of a *BusinessWeek* cover story, which, in turn, generated some one hundred and fifty additional stories about Bildman and Astra around the world. There is no evidence in the record that Astra was responsible for these stories.

Bildman's sexual harassment of employees at Astra was indeed a public controversy. As an initial matter and as reflected in the *BusinessWeek* article itself, the revelation of Bildman's conduct at Astra came several months after the revelation of another high-profile corporate sexual harassment scandal, which had generated a governmental investigation by the EEOC:

> The Astra example comes on the heels of the sexual harassment scandal at the Norman (Ill.) factory of Mitsubishi.... The [EEOC], which brought its largest suit of this kind against the company, alleges that Mitsubishi did not respond to the repeated complaints.... While Mitsubishi and Astra are extraordinary for the breadth and depth of their problems, many companies are struggling with sexual harassment claims.

R919.

As recognized by the SJC, "the issue of sexual harassment in the workplace is a focus of a considerable body of State and Federal law and regulation and a matter of frequent and often heated public debate." *Astra*, 455 Mass. at 145-146. Such was certainly the case when it came to Bildman's misconduct at Astra:

> The topic of Bildman's actions echoed far beyond Astra, its employees, and their families. For many months, it wove its way into the national and international discourse about permissible conduct in the workplace and the place and treatment of women in the private sector.

*Id.*

Not only was sexual harassment at Astra a public controversy by May 1996, but it was Bildman's conduct which *was* the controversy, as the trial court properly found based on the undisputed summary judgment record. R1233-1235—Summary Judgment Decision at 45-47 ("Bildman was at the center of a federal sexual harassment investigation of a publicly traded pharmaceutical company employing over 1,000 people in Westborough, Massachusetts"). *See Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 251 (1st Cir. 2000) (holding

that plaintiff was "central figure" in the public controversy concerning the influence of lobbyists and had been the subject of articles by *Time Magazine* and *Newsweek*).

Bildman was not only the central figure in the public controversy concerning *his* sexual harassment of employees at Astra, he voluntarily and affirmatively sought first to influence the *BusinessWeek* story *before* it was published, and then to influence the public's view of the public controversy centering on his conduct that was generated by the *BusinessWeek* story and the immediate print and electronic media stories about lawsuits and other allegations of his misconduct. Based on Bildman's press releases and public statements, and his counsel's repeated communications with news outlets denouncing those who had made these allegations, the trial court found "on the undisputed record, that Bildman was neither a victim nor an unwitting participant in the broad media coverage of his dispute with Astra." *Astra*, 455 Mass. at 145.

The SJC agreed:

> His is not a case in which the libel plaintiff is a "bit player" in a media drama created by forces over which he had no control. Bildman played a central role, with "access to the channels of effective communication" that most private individuals do not enjoy.... *It is readily apparent to us, as it was to the judge, that Bildman "palpably engineered efforts to project himself into the public limelight."*

*Astra*, 455 Mass. at 145-146 (quoting *Gertz*, 418 U.S. at 344 and *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156 (1971) (emphasis added)).

Bildman's assertion that the SJC's decision is at odds with this Court's precedent since *Gertz* is incorrect. He relies on three cases in support of his argument, each sharply different from the record in *this* case.

In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the defamation plaintiff was a private litigant whose divorce proceeding was covered by the media by virtue of her social status and the evidence of adultery by the parties. Indeed, there was no "public controversy." As this Court recognized, "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* at 545. Nor was there the requisite evidence that the plaintiff had thrust herself to the forefront of any controversy beyond the litigation between herself and her husband. *Id.* (wife did not "choose to publicize issues on the propriety of her married life. She was compelled to go to court...to obtain legal release from the bonds of matrimony"). As a result, the plaintiff was a private figure for purposes of her libel claims.

Similarly, in *Wolston v. Readers Digest Association*, 443 U.S. 157 (1979), the defamation plaintiff had failed to respond to a grand jury subpoena in connection with the government's investigation into Soviet espionage in 1958. Then, close to twenty years later, the defendants published a book contending that the plaintiff was a Soviet agent in the United States and had been indicted for espionage. In reversing the lower court's ruling that plaintiff was a limited purpose public figure in 1958, the Court recognized that the plaintiff had "not in any way [sought] to

arouse public sentiment in his favor and against the [government] investigation." *Id.* at 168.

Although the plaintiff's failure to respond to the grand jury subpoena caused significant media attention in 1958, the Court focused on the plaintiff's *role* in the public controversy and his interaction with the media.

> We emphasize that a court must focus on the "*nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*"... Similarly, *petitioner never discussed this matter with the press*, and limited his involvement to that necessary to defend himself against the contempt charge. It is clear that petitioner *played only a minor role* in whatever controversy there may have been concerning the investigation of Soviet espionage.

*Id.* at 167 (emphasis added) (quoting *Gertz*, 418 U.S. at 352)). Because the plaintiff was the passive recipient of media attention, and did nothing to seek to shape or influence it, and his conduct was limited to his failure to appear in response to a grand jury subpoena, this Court held that he was not a limited purpose public figure.

In the third case relied upon by Bildman, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the defendant's argument that the plaintiff qualified for limited purpose figure status rested principally on the fact that plaintiff, a scientist, had: (1) successfully applied for and received federal grants and (2) responded publicly to the defendant United States Senator's public announcement of the "Golden Fleece" award that chastised federal agencies for funding the plaintiff's research. This Court rejected

the defendant's argument because it found that the plaintiff's research only became a matter of public controversy *because of* the defendant's conduct and plaintiff did not "thrust himself or his views into the public controversy to influence others." *Id.* at 112-113 ("Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

Bildman's role in the public controversy and his attempt to influence it stands in stark contrast to the passive behavior of the defamation plaintiffs in *Firestone*, *Wolston*, and *Proxmire*. First, as the SJC stated, Bildman was not a "bit player" in the public controversy concerning the allegations of sexual harassment at Astra in 1996. Rather, he *was* the public controversy, playing a "central role" in creating, trying to suppress, and then attempting to influence the coverage of a sexual harassment scandal whose wide-ranging impact is best reflected by the international attention that it generated. *Astra*, 455 Mass. at 145-146 and n.45 ("We add that the media storm that swept over Bildman originated in *his own wrongful conduct* as a corporate officer and director beginning years before *BusinessWeek* began its investigation") (emphasis added).

Second, unlike the plaintiffs in *Firestone* and *Wolston*, Bildman actively sought out the media, directly and through his counsel, *before* Astra published any of the four statements that he asserts were actionable, in an effort to shape the media's reporting of his alleged sexual harassment of female employees. Indeed, Bildman had: (1) established a public relations task force in December 1995 in an effort to thwart, or shape, the *BusinessWeek* investigation; (2) directed his task force to meet with

*BusinessWeek* in April 1996 in an effort to persuade the magazine not to publish its exposé; (3) *after* his suspension, but before the *BusinessWeek* article's publication, directed his counsel to communicate, on his behalf, with *BusinessWeek* and to provide the "Statement of Lars Bildman"; and (4) after the *BusinessWeek* article's publication on May 2, 1996, continued to actively and repeatedly communicate with the numerous media outlets. *See Astra*, 455 Mass. at 146 ("It is readily apparent to us, as it was to the judge, that Bildman 'palpably engineered efforts to project himself into the public limelight'").

Third, unlike in *Firestone* and *Proxmire*, in which the defendants dragged the plaintiffs into the media spotlight, Astra had nothing to do with *BusinessWeek's* publication of "Abuse of Power" or of the subsequent news stories published in the *Boston Globe* and other newspapers in the spring and summer of 1996 concerning the various sexual harassment lawsuits that had been filed against Bildman.

Put simply, by the time Astra made the four statements which are the subject of this petition, Bildman had not only generated a public controversy concerning *his own conduct*, but had actively ensured that he stayed at the forefront of that controversy by attempting to use the media to influence the public's perception of him and his role in the controversy. *See Astra*, 455 Mass. at 145-146 ("Bildman played a central role, with 'access to the channels of effective communication' that most private individuals do not enjoy") (quoting *Gertz*, 418 U.S. at 344). The SJC properly held that Bildman was a limited purpose public figure for purposes of his negligent libel claims against Astra.

## II. THIS CASE DOES NOT MERIT REVIEW BECAUSE BILDMAN'S CONTENTION THAT THE FIRST AMENDMENT DOES NOT PROTECT ASTRA (1) HAS BEEN WAIVED AND (2) IS ERRONEOUS.

In his petition, Bildman asserts for the first time in over twelve years of litigation that "the First Amendment does not invest in foreign multinational corporations the same immunities as it guarantees a media defendant against liability in defamation actions." (Pet. Br. at 21-22).

As a threshold matter, it is worth noting that the trial court dismissed Bildman's claims against Astra AB (a foreign multinational corporation) well before summary judgment and Bildman withdrew his appeal of all rulings in favor of Astra AB. Moreover, Bildman's libel claims at the summary judgment stage were against Astra USA, Inc., which is a *New York* corporation. As a result, Bildman had no libel claims against a "foreign multinational drug company" in the trial court, and his appeal before the SJC similarly did not involve Astra AB.

In any event, Bildman never asserted that Astra was unprotected by the First Amendment either before the trial court or the SJC. As a result, Bildman has waived this issue. *See Plucket v. United States*,—U.S.—, 129 S.Ct. 1423, 1428 (2009) ("No procedural principle is more familiar to this Court than a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"); *Lazzara v. Wyle Electronics Co.*, 56 Mass. App. Ct. 1112, 2002 WL 3169483, at *4 and n.13 (Mass. App. Ct. 2002) ("We do not consider arguments or

issues not advanced below in opposition to summary judgment, but raised for the first time on appeal").

Moreover, this Court ruled less than two months ago that the "Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. Federal Election Commission*,— U.S.—, 130 S.Ct. 876, 913 (2010). The Court made it clear that it has long recognized that "First Amendment protection extends to corporations." *Id.* at 889-900 (citing approximately twenty cases).

> We thus find no support in the First Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation. . . .

*Id.* at 902 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978)).

Further, Bildman's attempt to draw a Constitutional distinction between corporations and "media defendants" in terms of the scope and protection afforded by the First Amendment has similarly been rejected by this Court.

> There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.

*Id.* at 905. Bildman fails to offer any contrary legal authority. Bildman's argument does not merit review by this Court.

## III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THERE ARE TWO ADEQUATE AND INDEPENDENT STATE GROUNDS UNDER MASSACHUSETTS LAW FOR THE SJC'S REJECTION OF BILDMAN'S NEGLIGENT LIBEL CLAIMS.

This Court has tended to deny petitions seeking review of state court decisions where adequate and independent state grounds exist supporting those decisions. E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, *Supreme Court Practice* at 4.25 (9th ed. 2007); Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960) (where substantial questions are presented and were properly raised in state court, "even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law").

While this Court presumptively has jurisdiction to review the SJC's decision under the standard articulated in *Michigan v. Long*, 463 U.S. 1032 (1983), it should decline the petition for certiorari since adequate and independent state grounds exist that support the SJC's decision on Petitioner's libel claims.[10] As this Court explained over sixty-five years ago:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment

---

[10] In *Long*, the Court held that it will presume that it has jurisdiction to review a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Long*, 463 U.S. at 1040-1041.

> would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

*Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). As Justice Stevens recently stated: "[e]ven if the state court opinion does not include the magic words set forth in *Long*, or some similarly explicit sentence, we lack jurisdiction if it is nonetheless apparent that the decision is indeed supported by an adequate and independent state ground." *Florida v. Powell*,—U.S.—, 130 S.Ct. 1195 (2010) (Stevens, J. dissenting).[11]

Here, and as Astra argued to the SJC, the jury's verdict, as reflected by its answers to special questions, supported the SJC's decision upholding dismissal of Bildman's negligent libel claims on two state law grounds entirely independent of whether Bildman qualified as a limited purpose public figure based on this Court's precedent and the record.[12]

---

[11] Indeed, even where the Court accepts a petition for review of a state court decision, its "practice is to avoid reaching constitutional questions if a dispositive non-constitutional ground is available." *Proxmire*, 443 U.S. at 122; *Wolston*, 443 U.S. at 160, n.2 ("[T]he general principle [is] that dispositive issues of statutory and local law are to be treated before reaching constitutional issues").

[12] *See* Astra's Reply Brief at pp. 10-13. The SJC had no need to reach these arguments, however, since it upheld the trial court's ruling that Bildman was a limited purpose public figure for purposes of the allegedly defamatory statements. Where Bildman did not appeal from the trial court's ruling that he had not adduced the requisite evidence of actual malice to survive summary judgment under the *New York Times* standard, the Court's ruling that Bildman was indeed a limited purpose public figure alone dictated that the trial court's decision granting

First, where the jury expressly found that Astra (1) had not breached the employment agreement in terminating Bildman for cause and (2) had undertaken its investigation reasonably and in good faith such that Astra had "a reasonable good faith basis for believing that Mr. Bildman had engaged in wrongful conduct justifying his termination 'for cause' under the 1993 employment contract," Astra had an independent conditional privilege under Massachusetts law to comment about its investigation of its CEO and his conduct because it was reasonably necessary to do so in order to protect its legitimate interests. *See Bratt v. International Business Machines Corp.*, 392 Mass. 508, 512-513 (1984) ("a person may possess a conditional privilege to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest").

Under Massachusetts law, this conditional privilege imposed the same burden on Bildman to adduce trial-worthy evidence of actual malice as he was required to adduce as a limited purpose public figure. *Id.* at 515-516. Accordingly, judgment was warranted for Astra on the entirely independent state-law basis of its conditional privilege, coupled with Bildman's inability to adduce evidence of actual malice on Astra's part.

Second, the specific jury findings that Bildman defrauded Astra, converted and wasted its assets, falsely misrepresented facts to it and/or withheld material facts from it, breached his fiduciary duties to it by misappropriating its funds, sexually harassed

---

summary judgment to Astra on Bildman's negligent libel claims be upheld.

Astra employees, retaliated against Astra employees and violated Astra's sexual harassment policy established that the allegedly defamatory statements that underlie this appeal were "substantially true," at the very minimum. Therefore, whether or not Bildman qualified as a limited purpose public figure on the basis of the applicable precedent and the record, the jury verdict has effectively established that Astra's statements were true and could not support a defamation claim even if this Court were to disagree with the conclusion that Bildman were a limited purpose public figure on the record in this case.

### A. The Jury's Answers To Special Questions Established Astra's Conditional Privilege To Comment On Its Investigation Into Its Former CEO's Misconduct, And Imposed An Independent Burden On Bildman To Adduce The Requisite Evidence Of Actual Malice.

Under Massachusetts law, an employer has a conditional privilege to comment on its reasons for terminating an employee as long as its communications are made principally for the purpose of furthering its legitimate interests. The conditional privilege protects an employer from liability unless the employee can establish that it acted with actual malice or acted recklessly by unnecessary, unreasonable or excessive publication of the allegedly defamatory material. *See, e.g., Bratt*, 392 Mass. at 512-516; *Broomes v. Blue Cross Blue Shield of Massachusetts, Inc.*, 74 Mass. App. Ct. 1123, 2009 WL 1953006, *9 (Mass. App. Ct. July 9, 2009) (affirming summary judgment on defamation claims; "the employee bears the burden of demonstrating that the employer has lost the privilege"); *Kyle v. Mongan*,

72 Mass. App. Ct. 1111, 2008 WL 2951800, *2-3 (Mass. App. Ct. August 4, 2008) (affirming summary judgment dismissing defamation claim because the defendant president of a hospital under public scrutiny for terminating employee "had a conditional privilege to publish defamatory material about Kyle in order to protect MGH's legitimate business interests"); *Sklar v. Beth Israel Deaconess Medical Center*, 59 Mass. App. Ct. 550, 558 (2003) (affirming grant of summary judgment because supervisor's publication of information about employee's possible ethical violations was conditionally privileged); *Dragonas v. School Committee of Melrose*, 64 Mass. App. Ct. 429, 438-439 (2005) (conditional privilege is lost "only if publication is not made chiefly for the purposes of furthering the [business] interest").

Astra moved for summary judgment on Bildman's negligent libel claims not only on the basis of Bildman's status as a limited purpose public figure, but on the alternative ground that it was conditionally privileged to comment on Bildman's suspension and termination in order to protect its legitimate business interests in the context of the extraordinary public controversy surrounding the allegations of sexual harassment by Astra management and the highly-publicized EEOC investigation into the company that ensued. *See* R1242-1243. In opposing Astra's motion for summary judgment, Bildman did not assert that Astra's statements were published "excessively." Rather, he argued that Astra had published the statements based on an improper motive and with ill will.

While the trial court agreed that Bildman was a limited purpose public figure and granted summary judgment on that basis, it found that, because Bildman contended that Astra's investigation was a

wrongful one, Astra's entitlement to the conditional privilege was a matter of dispute, and therefore not one that could be determined as a matter of law. R1244-1247.

However, the subsequent jury verdict in Astra's favor and in favor of the two Astra executives who Bildman contended had tortiously interfered with his employment agreement, and the jury's answers to the special questions posed to it, have conclusively resolved that dispute in Astra's favor. They establish that Astra was indeed conditionally privileged to comment on the discipline of its CEO. *See* R5658-5664.

Specifically, the jury found that Astra's investigation into Bildman's conduct leading to his termination for cause produced substantial evidence that he had misappropriated corporate funds for personal purposes, engaged in inappropriate conduct toward employees and been dishonest with Astra's Board of Directors. The jury expressly found that Bildman had, indeed, defrauded Astra, wrongfully converted and misappropriated its funds, engaged in sexual harassment of Astra employees and retaliated against them, and made false representations of fact or failed to disclose material facts to Astra's Board. And, unsurprisingly given its findings that Bildman had *actually* engaged, *inter alia*, in fraud, misappropriation of corporate funds, misleading conduct and sexual harassment, the jury also expressly found that "[a]t the time Astra terminated Mr. Bildman, Astra [had] *a reasonable good faith basis* for believing Mr. Bildman had engaged in conduct justifying his termination 'for cause'" under his employment agreement. *See* R5662 at Q.19 (emphasis added).

Similarly, the jury expressly found that Mogren and Johansson had *not* tortiously interfered with Bildman's employment agreement, effectively constituting a finding that they did not act in bad faith or out of an improper motive. *See* R5663; *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 608 (2007) (reversing verdict on tortious interference claim; "the 'improper motive or means' element requires proof of actual malice, i.e. 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest'").

In short, the jury verdict answered the very dispositive question that the trial court found was unanswerable at the summary judgment stage on the applicability of the conditional privilege under Massachusetts law: Astra's actions were fair, in good faith and not based on improper motive. Accordingly, Astra was conditionally privileged to comment on its investigation of and disciplinary actions against its former CEO. Bildman did not and does not challenge the trial court's finding that, assuming that Astra had stated anything about him that was actually untrue, he had failed to adduce evidence at the summary judgment stage that Astra had acted in reckless disregard of the statement's untruth.

### B. The Jury Verdict And Its Answers To Special Questions Also Established The Substantial Truth Of Astra's Purportedly Actionable Statements.

The SJC's judgment would be proper on yet another independent state ground, even if Bildman was not a limited purpose public figure, for the most fundamental reason of all. Astra's purportedly actionable statements were *true or substantially true*, as established by the jury's verdict in Astra's favor.

*See Mason v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-517 (1991) (Law of libel "concentrates upon substantial truth.... Minor inaccuracies do not amount to falsity so long as the substance, the gift, the sting, of the libelous charge be justified"); *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 770-771 (2003) (Statements "were essentially true, albeit with minor inaccuracies, and so were not defamatory").

A comparison of the statements that formed the basis of Bildman's appeal first to the SJC and now to this Court, on the one hand, with the jury's express findings, on the other, demonstrates that the jury has adjudicated the truth or substantial truth of each of these statements—all in Astra's favor. The SJC summarized Bildman's negligent defamation claim as follows:

> On appeal, Bildman's negligent libel claim focuses on the following statements: (a) a May 3, 1996, article in the *Wall Street Journal* in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the *Business-Week* investigation;
>
> (b) a speech Mogren gave to Astra employees on May 13, 1996, in which he stated, among other things: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened";
>
> (c) a June 26, 1996, Astra news release and press release that made identical statements that, as Bildman summarized on appeal, he "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space

> for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and
>
> (d) an Astra statement appearing in the February 5, 1998, *Boston Globe* that Bildman's "actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company."

*Astra*, 455 Mass. at 143, n.42.

The jury's verdict that Bildman had defrauded Astra, misappropriated its funds and made material misrepresentations or withheld material facts from its Board conclusively establishes the truth of statements (a) and (b).

Its express findings that Bildman had sexually harassed and retaliated against Astra employees, had violated Astra's sexual harassment policies, had defrauded Astra out of $1,042,000 and had converted that amount for personal use, confirmed at a minimum the "substance" of statements (b) and (c).

As for statement (d), as the SJC pointed out:

> The jury also heard evidence that at Bildman's direction and without the knowledge of Astra's Board, Magnusson [an individual hired by Bildman] set up a five-employee satellite office from which he shredded corporate documents; that he and Bildman removed Astra documents, including financial documents from Bildman's office; and that after receiving a telephone call from Bildman, Magnusson had company computers 'erased'.

*Id.* at 123.

Although the jury was not asked to answer a specific question on the precise issue of whether Bildman had "ask[ed] people to destroy records," the jury *was* asked to make an express finding of whether or not he had misrepresented material facts to, and/or had withheld material facts from, Astra's Board of Directors, which clearly encompasses the "substance" or the "gist" of the alleged defamatory statement, namely, that Bildman had engaged "in our estimation [in] an attempt to cover up and keep things form his superiors in the company." This statement was not merely supported by extensive evidence, but also established by the jury's express findings.

Bildman has not challenged *any* of the jury's express findings or, indeed, any other aspect of the verdict. In short, the unchallenged jury verdict established the truth or, at a minimum, the substantial truth of every one of the purportedly actionable statements. Therefore, the SJC's judgment is correct for this additional reason.

Given the independent state-law grounds that support the SJC's rejection of Bildman's negligent libel claims, the Court should decline review of this case. *See Proxmire*, 443 U.S. at 122 ("Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available.... If the District Court correctly decided the state law question, resolution of the First Amendment issue would be unnecessary").

## CONCLUSION

For the foregoing reasons, Respondent Astra USA, Inc. respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

JEFFREY S. ROBBINS
A. W. PHINNEY, III*
JOSEPH D. LIPCHITZ
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C
One Financial Center
Boston, MA 02111
(617) 542-6000
AWPhinney@mintz.com

**Counsel of Record for Respondent*

April 2, 2010

# APPENDIX

## TABLE OF CONTENTS TO APPENDIX


Page

APPENDIX A: Memorandum Of Decision And Order On Parties' Motions For Summary Judgment, dated October 29, 2001 ..... 1a

APPENDIX B: Suffolk Superior Court Special Question Verdict Form, dated February 21, 2002 ..... 102a

APPENDIX C: Final Judgment After Rescript, dated January 6, 2010 ..... 109a

# APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

---

SUPERIOR COURT CIVIL ACTIONS
No. 98-0580-C
No. 99-1942-G

---

ASTRA USA, INC.,
*Plaintiff,*

vs.

LARS BILDMAN,
*Defendant,*

vs.

HÅKAN MOGREN & another[1],
*Third-Party Defendants*

---

LARS BILDMAN,
*Plaintiff,*

vs.

HÅKAN MOGREN. & another[2],
*Defendants*

---

[1] Carl-Gustaf Johansson.

[2] Carl-Gustaf Johansson.

## MEMORANDUM OF DECISION AND ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT

This case arises out of the 1996 termination by Astra USA, Inc. of Lars Bildman as its President and Chief Executive Officer. Cross motions for summary judgment are before the court.

## BACKGROUND

The undisputed facts and the disputed facts viewed in the light most favorable to the nonmoving party, as revealed by the summary judgment record, are as follows. Swedish company Astra AB, together with its 50 subsidiaries in approximately 40 countries ("the Astra Group"), is engaged in a worldwide pharmaceutical business employing over 20,000 people. Astra U.S.A. is a New York corporation which until 1999 was a wholly-owned subsidiary of Astra AB and operated through its own Board of Directors. In 1981, Lars P.E. Bildman ("Bildman") became Astra U.S.A.'s President, Chief Executive Officer and a member of its Board of Directors. Håkan Mogren ("Mogren") joined the Astra Group in 1988 when he became President and Chief Executive Officer of Astra AB. In addition, Mogren served as a director of Astra U.S.A. beginning in 1988. Carl-Gustaf Johansson ("Johansson") joined the Astra Group in 1963 and in 1995 was elected to the Astra U.S.A Board of Directors and became Astra's Regional Director for North America.

Initially, Bildman's employment with Astra U.S.A. was as an Astra AB expatriate, under an agreement dated April 30, 1981. This expatriate agreement provided for the payment of specifically enumerated expenses related to employment abroad. According to Bildman, the expatriate employment agreement did not set forth all the terms he had negotiated

with Astra AB's CEO and President at the time, Ulf Widengren ("Widengren"). (7/30/01 Bildman Aff. ¶ 2)[3] Between 1981 and 1993, the terms of the expatriate employment agreement changed many times, based on negotiations between Bildman and the President and CEO of Astra AB; however, these changes were not memorialized.

When Bildman moved to Astra U.S.A. as an expatriate, Widegren and Astra AB's CFO, Peter Sjostrand ("Sjostrand"), authorized payment by Astra U.S.A. of routine legal services for Bildman's benefit. (Tully Dep., pp. 25-26). The expatriate employment agreement itself is silent as to legal services. Bildman believed that as an expatriate he was entitled to have Astra U.S.A. pay for his personal legal services, and he charged personal legal fees involving real estate, disputes with a neighbor and traffic violations to Astra U.S.A. As a Swedish citizen, Bildman was concerned that a traffic violation in the United States would cause him to lose his driver's license. Jan B.A. Janson, the President of Astra Japan, lost his license due to a traffic violation and Astra had to pay for a chauffeur to drive him around while his license was suspended. Bildman therefore believed it was an appropriate business expense and in accordance with the terms of his expatriate employment agreement to have Astra U.S.A. pay for his personal legal fees in connection with a speeding ticket he received. Bildman never obtained the authorization of Astra U.S.A.'s Board of Directors for these personal legal expenses.

---

[3] In addition, according to Bildman, the agreement produced by Astra in this litigation is incomplete and is missing a page after the signature page which dealt with Bildman's compensation. (7/30/01 Bildman Aff. ¶ 2).

In 1976, Bildman was provided with a copy of the Astra Group General Conditions for Foreign Service ("General Conditions") which applied to expatriate employees. The General Conditions provided that remuneration and benefits specified in the employee's written contract "shall be the total compensation to which the Employee is entitled." The General Conditions further provided that the employee could receive a housing allowance if jointly approved in advance by the receiving company and Human Resources, but that "[i]f the Employee purchases a house or other accommodation in the Country of Service, all costs and/or losses in connection with the buying and selling thereof will be the responsibility of the Employee" Bildman never asked Astra AB to pay for the purchase of his home or for any renovations or improvements to his home when he was employed as an expatriate.

According to Bildman, the General Conditions applied only to mid or lower level employees and did not apply to him or other Presidents of Astra AB subsidiaries. When he received the revised version of the General Conditions from Gunnar Christiani ("Christiani") in 1991, Bildman informed Christiani and Sjostrand, then Astra's Regional Director of North America, that the General Conditions did not apply to him as President and CEO of Astra U.S.A. Sjostrand confirmed that the General Conditions did not apply to Bildman. Bildman refused to sign the General Conditions.

Around 1992, Johansson, who was then responsible for Astra AB's subsidiaries in Southern Europe, advocated that Astra AB transfer its right to market Pulmicort Turbuhaler in the United States to Schering-Plough in return for Schering-Plough

transferring its rights to sell the Pulmicort Turbuhaler in Italy, France and Spain to the Astra AB subsidiaries there. (Solvell Dep. Vol V, pp. 692-693). Bildman was strenuously opposed to this proposal. (Solvell Dep. Vol. V, pp. 694). At a meeting in Boston, Johansson and Bildman were in such strong disagreement that they were screaming at each other and almost came to blows. (Solvell Dep. Vol. V, pp. 693-697; Testen Aff. ¶ 10). In the end, Astra retained the marketing rights to Pulmicort Turbuhaler, and Johansson's proposal was not adopted. (Solvell Dep. Vol. V, p. 694).

In September of 1992, Bildman approved an Astra U.S.A. Administrative Expense Report completed by Stefan Solvell ("Solvell") which, in addition to 21 other entries, contained a $500 contribution to the Hatch Election Committee. In approving expense reports, Bildman did not read the reports or assess each individual item included; he merely signed them. Bildman did not seek any legal advice as to whether reimbursement of campaign contributions was legal before authorizing the report, nor did he disclose his authorization of such reimbursement to the Board of Directors.

On June 15, 1993, Bildman entered into a direct employment agreement with Astra U.S.A. ("the Employment Agreement"). Mogren signed the Employment Agreement in his capacity as an authorized representative of the Astra U.S.A. Board of Directors' Compensation Committee. According to Bildman, although Mogren signed a portion of the agreement, he did not sign a portion relating to financial compensation. Bildman repeatedly requested that Mogren provide him with a signed copy, but Mogren never did.

The Employment Agreement states that it is effective July 1, 1993 and shall remain in full force and effect indefinitely until terminated in accordance with the provisions of Paragraph 4. The Agreement further states that "all prior agreements and understandings governing the Employee's employment shall be deemed to have terminated and be of no further effect, whether such agreements and understandings were between the Employee and the Company or between the Employee and any parent, subsidiary or affiliated corporation or entity of the Company." Under Paragraph 2 of the Employment Agreement, Bildman agreed:

> to assume such duties and responsibilities as are commensurate with the customary duties of President and Chief Executive Officer and a member of the Company's Board of Directors, and as may be assigned to the Employee by the Company's Board of Directors or by the by-laws of the Company from time to time, subject to the supervision, direction and control of the Company's Board of Directors, to whom the Employee shall be responsible.

(Ex. 1 to Mogren Aff. ¶ 2(a)).

Paragraph 3 of the Employment Agreement sets forth Bildman's base salary and provides for annual bonus compensation to be paid in accordance with the formula set forth in the Company's annual incentive bonus plan. Paragraph 3 also provides that Astra "shall reimburse the Employee for all reasonable travel, entertainment, and other business expenses incurred by him in the performance of his duties and responsibilities, subject to such reasonable requirements with respect to substantiation and docu-

mentation as may be specified by the Company or its auditors."

Paragraph 4 of the Employment Agreement sets forth the various ways in which either party can terminate the Agreement Paragraph 4(f) provides in relevant part:

> The Employee's employment hereunder may be terminated for cause by the Company, effective immediately, by a vote of a majority of all of the members of the Board of Directors, on written notice to the Employee setting forth in reasonable detail the nature of such cause. For purposes of this Agreement, "cause" means only: (i) the willful commission by the Employee of theft; embezzlement, fraud or other serious and substantial crimes against the Company, or (ii) other acts or omissions materially evidencing bad faith toward the Company, or (iii) conviction of the Employee of any criminal offense involving dishonesty or breach of trust or any felony.

The Agreement further provides that "[i]n the event of the termination of the Employee under this Paragraph, the Company shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant" (Ex. 1 to Mogren Aff. ¶ 4(f)).

Paragraph 8 of the Employment Agreement provides:

> The Company agrees to indemnify the Employee in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from and against any and all claims, damages, suits, costs,

or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of this Agreement for any reason.

Paragraph 9 provides:

> The Company shall pay to the Employee all reasonable legal fees and expenses incurred by him in contesting or disputing any termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement. In no event shall the Employee be required to reimburse the Company for any legal fees or expenses incurred by it in connection with this Agreement.

The Employment Agreement states that it constitutes the entire agreement between the parties with respect to its subject matter and can only be amended or modified by a writing executed by the employee and an authorized representative of the company. (Ex. 1 to Mogren Aff. ¶¶ 11, 13). The Agreement also states that it shall be construed and enforced in all respects in accordance with Massachusetts law. (Ex. 1 to Mogren Aff. ¶ 15).

According to Bildman, the Employment Agreement did not contain all the terms of his employment. (7/30/01 Bildman Aff. ¶ 7). Bildman claims that during negotiations, Mogren agreed to a three year written severance period, but at the time of execution, Mogren told Badman that he could not give more than two years severance in writing because of the Swedish political climate. (7/30/01 Bildman Aff. ¶ 7). Upon signing the agreement, Mogren orally agreed to give Bildman a third year of severance, and the two men had a separate handshake agreement to that

effect in front of Clauss Wilhelmson ("Wilhelmson"), who was then Astra AB's Regional Director for North America. (7/30/01 Bildman Aff. ¶ 7). In addition, although the Employment Agreement provided that the Astra U.S.A. Directors would determine Bildman's compensation, Mogren told Bildman that he and Wilhelmson would determine Bildman's compensation, which they did. (7/30/01 Bildman Aff. ¶ 8). Similarly, although the agreement provided that Bildman would serve subject to the supervision, direction and control of Astra U.S.A.'s Board, Mogren told Bildman that he would be subject to the supervision, direction and control of Astra AB. During Bildman's tenure as President of Astra U.S.A., he was subject to direct supervision and control by Mogren and Astra AB, through Johansson and other Astra AB executives. (7/30/01 Bildman Aff. ¶ 6).

Astra U.S.A.'s Travel and Expense Policy and Guidelines, dated October 1, 1994, state that it is "Astra's policy to reimburse employees for actual expenses that are reasonable and necessary for carrying out the Company's business." Personal meals in non-travel status and personal entertainment are specifically listed as non-reimbursable expenses. The Travel and Expense Policy provides:

> Reasonable entertainment expenses are reimbursable, and the expenditure should be incurred on a common sense basis. These expenses are reimbursable only if they are directly related to the active conduct of the company's business when directly preceding or following a business discussion, or are necessary to accomplish some useful purpose connected with the company's business.

- To qualify as a business expenditure, entertainment expenses cannot be lavish or extravagant and must be "directly related to" or "associated with" the company's business.
- Entertainment expenses must meet the "directly related test" below:

  1. The company must expect to derive income or some other specific business benefit other than good will at some future time.
  2. The employee/company must engage in active conduct of the business during the entertainment with the persons being entertained.
  3. The active conduct of business must be the primary aspect of the combined business and entertainment activity.

(Ex. 2 to Yon Dep. p. 16).

According to Bildman, Astra U.S.A.'s Travel and Expense Policy did not apply to him. As President of Astra U.S.A., Bildman retained the authority to incur travel and entertainment expenses within his sole discretion, provided that such expenses were within the budget and Bildman believed they would promote some business purpose. (7/30/01 Bildman Aff. ¶ 9; Sjostrand Aff. ¶¶ 6-8; Broere Aff. ¶ 9). Further, entertaining visiting Astra AB executives with adult entertainment was encouraged, not prohibited. (7/30/01 Bildman Aft ¶ 9).

Bildman authorized payment of several months' salary to Nan Corcoran, a former Astra employee, after she filed a claim with the Massachusetts Commission Against Discrimination alleging sexual harassment by Bildman. In 1994, Bildman authorized

Astra U.S.A. General Counsel Charles Yon ("Yon") to pay $50,000 to former Astra employee Jennifer Shore in order to settle her claim that Bildman had sexually harassed her. In 1994, Bildman also authorized Yon to pay $95,000 to former Astra employee Jennifer Price to settle her claim that Bildman had terminated her in retaliation for reporting a complaint that another employee had been sexually assaulted by Astra executive George Roadman. Finally, Bildman authorized Yon to execute a Settlement Agreement and General Release dated January 5, 1996 paying former Astra employee Pamela Zortman $100,000 in settlement of her sexual harassment claims against Bildman. (Ex. P to Clauss Aff. Bildman Dep. Vol. VI, pp. 894-896; Ex. 51 to Bildman Dep.). Bildman did not personally disclose these settlements to Astra U.S.A.'s Board of Directors and did not obtain Board approval for them, at least in part because Neal Tully ("Tully"), counsel to and Secretary of Astra U.S.A.'s Board of Directors, advised him that Board approval of the settlements was not necessary. (Tully Dep., pp. 125-126). In addition, Tully himself made various presentations to the Board of Directors in which he discussed and reported various sexual harassment claims and settlements. (Tully Dep., pp. 125-130).

In July of 1994, Bildman approved an Astra U.S.A. Administrative Expense Report completed by Michael Fox ("Fox") which, in addition to 19 other entries, contained a $1,000 contribution by Fox to the Republican Party and a $100 contribution to the Blute for Congress Campaign. In approving expense reports, Bildman did not read the reports or assess each individual item included; he merely signed them. After it was discovered that the reimbursements were improper, Yon wrote Fox, stating that the company had "unknowingly violated the federal election

laws" and instructing him to pay back Astra U.S.A. for the campaign contributions. (Bildman Ex. 48).

In 1995, after Mogren promoted Johansson to the position of Astra AB's Regional Director for North America, giving him direct supervisory authority over Astra U.S.A. and Bildman, the relationship between Bildman and Johansson became severely strained. (7/30/01 Bildman Aff. ¶ 33; Yon Interview, pp. 107-108). Johansson and Bildman repeatedly clashed over Johansson's insistence that he and Astra AB had responsibility for FDA contact in connection with product marketing, while Bildman maintained that Fox, Astra U.S.A.'s Vice President of Regulatory Affairs, had such authority. (2/18/00 Bildman Aff. ¶¶ 11). In addition, Bildman persistently objected that Johansson was micro-managing Astra U.S.A.'s affairs, while Johansson repeatedly criticized Bildman for acting without first obtaining his approval. (2/18/00 Bildman Aff. ¶¶ 13, 16). The relationship between Johansson and Bildman worsened in early 1996, when Astra AB began exploring the possibility of a merger between Astra U.S.A. and Astra-Merck, Inc., a merger to which Bildman was vehemently opposed. (7/30/01 Bildman Aff. ¶ 32).

In a December 19, 1995 telephone conference, Bildman, Yon and Astra U.S.A.'s outside employment counsel William Joy ("Joy") informed Johansson and Staffan Ternby, Astra AB's Director of Public Relations, that *Business Week* was investigating allegations of sexual harassment at Astra U.S.A. (5/11/98 Bildman Aff. ¶ 12). Bildman then assembled a task force to monitor and investigate *Business Week's* investigation of Astra. (5/11/98 Bildman Aff. ¶ 13). The members of the task force were Yon; Joy; Arnold Zenker, a Boston media consultant; Attorney John

Walsh, a New York media and First Amendment lawyer; Ken Rabin, President of InterScience, a national public relations firm and Attorney Andrew Culbert, who had previously worked for Astra AB.

On January 15, 1996, Bildman wrote Mogren and Johansson, stating that a *Business Week* reporter was questioning former and current Astra U.S.A. employees about allegations of incidents of sexual harassment at the company. (Johansson Aff. ¶ 6). Bildman stated that Astra U.S.A. did not have any problems with sexual harassment and that it was unlikely that any article would be written. (Johansson Aff. ¶ 6). Mogren and Johansson did not know and Bildman did not inform them that several claims of harassment had been made against him personally. (Mogren Aff. ¶ 5; Johansson Aff. ¶ 9). On or about January 16, the task force prepared a report concluding that Astra U.S.A. had a good record concerning sexual harassment and that a competitor such as Astra-Merck, Inc. might be behind or involved in *Business Week's* inquiry. (5/11/98 Bildman Aff. ¶ 15). This report was sent to Mogren and Johansson. (Second Set Ans. to Inter. No. 15; Bildman Ex. 58). Johansson told Bildman that he believed that a different competitor, Glaxo, was behind the *Business Week* investigation. (5/11/98 Bildman Aff. ¶ 18; Bildman Ex. 30).

In the Spring of 1996, Leonard Decof recommended to Bildman, Yon and Lars Magnusson that they tape conversations with Astra employees and officers because of the *Business Week* investigation. Bildman taped several phone conversations he had with Mogren and Johansson, as well as other Astra executives, after he became suspicious that they were not acting in the best interests of Astra U.S.A. The taping of conversations occurred in a hotel room in Rhode

Island, where it was not illegal to record conversations without the other party's knowledge. According to Bildman, such taping was standard practice at Astra. (Bildman Dep. Vol. I, p. 164). Bildman never reported his taping of conversations to Astra U.S.A.'s Board of Directors. In April of 1996, Johansson became enraged when Bildman had his staff perform an analysis of Johansson's proposed transfer of products from Astra U.S.A. to Astra Merck, Inc. which showed that the transfer would harm Astra U.S.A. and possibly violate antitrust laws.

On April 19, Mogren, Johansson and several other executives received from Yon a copy of an April 18 letter to Yon from Mark Maremont ("Maremont") at *Business Week*. (Mogren Aff. ¶ 21; Johansson Aff. ¶ 12). Maremont's seven page letter contained detailed and serious allegations of sexual harassment and other misconduct at Astra U.S.A., including misconduct by Bildman. Johansson, accompanied by Astra AB's General Counsel Göran Lerenius ("Lerenius"), and Thomas Clauss, Jr. ("Clauss"), a partner in the law firm of Winthrop, Stimson, Putnam & Roberts, went to Astra U.S.A. to try to learn more about the allegations. On April 22, Joy met with Johansson, Lerenius and Clauss and reviewed seven sexual harassment claims which Joy and You had previously investigated and, in some instances, settled. On April 23, Clauss and Lerenius interviewed Bildman concerning the allegations in the Maremont letter. Bildman denied the allegations in the letter and stated that the questions should be referred to Joy.

On April 25, Johansson received a copy of a 12 page letter from Maremont to Yon containing additional details of sexual harassment at Astra U.S.A. and implicating Bildman. (Ex. 1 to Johansson Aff.). Bildman

spoke to Mogren, Johansson and Clauss during this time and answered their questions concerning the *Business Week* allegations to the best of his ability. (7/30/01 Bildman Aff. ¶ 13).

At a meeting on April 28, 1996, the Astra U.S.A. Directors unanimously voted to establish a Special Committee to retain experts to assist in an investigation of the allegations against Bildman. (Mogren Aff. ¶ 25). Johansson was made chairman of this Special Committee. (Carling Aff. ¶ 6). Bildman was suspended with pay, and Jan Larsson ("Larsson") was appointed as Astra U.S.A.'s President and Chief Executive Officer. (Mogren Aff. ¶¶ 25, 26). That same day, Johansson wrote Bildman informing him of the suspension and stating: "ASTRA expects that during your suspension you will be available during normal business hours to cooperate with the Company's efforts to investigate the allegations and otherwise act in the best interest of the Company and in accordance with the obligations of your employment agreement." The letter further stated, "Because of the investigation, you should not contact any employees or ex-employees of the Company except for the Director of Human Resources if you have questions about health and welfare benefits and Jan Larsson or Göran Lerenius about the investigation. All other employees have or will be instructed not to communicate with you until the investigation is complete." (Ex. 2 to Johansson Aff.).

On April 29, Johansson gave a speech to Astra U.S.A. employees in which he stated:

> The first action is that Mr. Lars Bildman has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as

> CEO. Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity.
>
> The second action taken yesterday was that a committee of the Board of Directors of Astra USA has retained independent counsel to assist it in performing the investigation. The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company.

The same day, Astra issued a news release entitled "Astra Elects New President and CEO" which stated:

> Mr. Larsson replaces Lars Bildman, who has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. . . .
>
> The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company. .
>
> A preliminary investigation by senior company officials resulted in the decisions announced today.

Also on April 29, Astra issued a press release containing identical statements.

The Board of Directors retained Winthrop, Stimson, Putnam & Roberts to conduct the investigation. Clauss oversaw a team of lawyers and paralegals which interviewed over 100 witnesses, including present and former Astra U.S.A. employees and officers, subcontractors and vendors, and officers and employees

of other Astra Group companies. (Clauss Aff. ¶¶ 2-6). In addition, the team reviewed thousands of pages of documents and other materials, including files from Astra U.S.A.'s finance, personnel and legal departments, and documents from vendors and subcontractors, including outside counsel who had handled the sexual harassment claims. (Clauss Aff. ¶¶ 2-6). During the investigation, Bildman contacted or attempted to contact at least 18 Astra employees, 14 of whom were individuals being interviewed by Astra's investigators. (Bildman Dep. Vol. V, pp. 771-780; Healey Aff. ¶¶ 5-7).

On May 3, 1996, the *Wall Street Journal* published an article entitled "Astra USA Investigates Alleged Misuse of its Funds by Suspended CEO, Others" which stated:

> [spokesman] Mr. Kincannon said that Astra AB officials grew concerned when Mr. Bildman was 'not forthcoming' to them in handling inquiries from *Business Week* magazine about possible sexual harassment at Astra USA. "He assured them that nothing was wrong," Mr. Kincannon said.

That same day, the *Boston Globe* published an article entitled "Astra: CEO Allegedly Harassed Women: Says suspended Bildman also tried to cover up actions" which stated: "Bildman told executives at Astra USA's Stockholm parent company last December that a reporter was looking into sexual harassment claims at its US subsidiary, said Benjamin Kincannon, Astra U.S.A. spokesman. But 'he downplayed it,' Kincannon said."

On May 13, 1996, Mogren addressed Astra's Annual Meeting on the issue of "Improprieties at Astra USA, Inc." and stated:

> But as a result of preliminary investigation at the end of April, we were able to confirm that a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole. . . .
>
> Concerning the sexual harassment now in question, it should be said that what has occurred is at beast a violation of good style and form. At worst, a number of our employees have also been caused inconveniences or suffering. To the extent this may have occurred, we are deeply regretful. We will do everything we can to prevent it from ever happening again. . . .
>
> As soon as we in Astra's corporate management, through our preliminary investigation, were practically certain that serious had happened, we swiftly set in a number of measures.
>
> First, the CEO and two colleagues of the American subsidiary were suspended. . . .
>
> What has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened.

Also on May 13, *Business Week* published an article by Maremont entitled "Abuse of Power: the astonishing tale of sexual harassment at Astra's U.S. pharmaceutical subsidiary." The article contained the following statements:

> On April 29 as *Business Week* was about to publish the results of a six-month investigation into allegations of rampant sexual harassment at Astra, Bildman was suspended and relieved of his responsibilities by Astra's parent, giant Swedish drug-maker Astra AB. . . .

> Senior Astra executives acknowledged that *Business Week's* investigation sparked the abrupt action. Although Bildman had told superiors about the investigation months ago, Carl-Gustaf Johansson, a member of Swedish Astra's executive committee, says the company was unaware of the full scope of the allegations until it received a lengthy letter from *Business Week* on April 19. "We hadn't heard anything this detailed—and certainly not that Mr. Bildman himself was the focus" of some allegations, says Johansson. Refusing further comment on Astra's own preliminary inquiries—which also now include allegations of major financial improprieties by Bildman—Johansson says Astra suspended its U.S. CEO because "we lost some trust in him."

On May 24, 1996, the *Boston Globe* published an article entitled "Astra AB's chief says Bildman won't be back," which stated:

> Astra AB Chief Executive Håkan Mogren said Lars Bildman, the suspended chief executive of the company's scandal-plagued U.S. unit in Westboro, will not return to the position he had occupied for the past 15 years.
>
> "It would be impossible to have him back in that job. How could people work together and create a good atmosphere?" Mogren said in New York.

Also on May 24, the *Boston Herald* published an article entitled "Suspended Astra Exec Won't Return" which contained identical statements.

In May of 1996, Kincannon appeared on a CBS News "Eye on the Nation" segment concerning the allegations of sexual harassment at Astra U.S.A.

When asked whether Bildman would return to Astra U.S.A., Kincannon replied that he would not. Kincannon based this response on newspaper reports that, according to Mogren, Bildman would not be returning.

Throughout the investigation, Bildman, through his counsel, declined to be interviewed or to answer questions in person posed by the Special Committee, either orally or in writing. (Clauss Aff. ¶¶ 12-17). Counsel for Bildman met with the investigators, provided a denial of the general allegations of misconduct and offered to produce additional information to investigators if they would state the specific basis for the allegations. Although Bildman requested that Astra provide him with a list of specific allegations being investigated so that he could respond, the investigators refused to do so. However, on June 7, 1996, Astra investigators wrote Bildman's counsel, setting forth a list of nine specific questions for him to answer. Bildman did not respond to this letter. In refusing to cooperate, Badman consistently expressed concern about the bias and pre-ordained results of the investigation.

The Special Committee presented Astra U.S.A.'s Board of Directors with a Draft Report on June 13, 1996, describing the scope of its investigation and summarizing its conclusions. The Draft Report opined that there was substantial evidence that Bildman had engaged in the sexual harassment of female employees, received personal benefits from services performed by Astra vendors and paid for by Astra, received reimbursement for improper business expenses such as personal vacations, travel, and legal fees for personal matters and attempted to impede the investigation by contacting Astra employees and

vendors and destroying documents. (Ex. D to Clauss Aff.). On June 25, 1996, Johansson and Clauss presented the Special Committee's final report to the Board of Directors. The Board unanimously voted to terminate Bildman's employment for cause under paragraph 4(f) of the Employment Agreement. (Ex. E to Clauss Aff.; Johansson Aff. ¶ 26). Despite prior notification that the Board intended to vote on his termination, Bildman declined to attend the June 25 meeting. (Johansson Aff. ¶¶ 24-25).

On June 26, 1996, Astra AB issued a news release which stated:

> Astra USA today announced the termination of Lars Bildman, the former President and CEO of the company. Bildman had been suspended on April 28, 1996 pending the results of an investigation into improprieties within the company that occurred during his tenure as CEO. . . .
>
> Bildman's termination was announced at a press conference at which Astra officials commented on the investigation by the company into allegations of sexual harassment, financial improprieties, and other activities considered inappropriate by the company.
>
> Bildman chose not to cooperate with the investigation.
>
> "Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra," said Executive Vice President C.G. Johansson of Astra AB, who headed the investigating committee established by the Board of Astra USA. . . .

> The investigation showed evidence of a variety of improper activities, including misuse of company funds, inappropriate behavior at company functions, disregard of established company rules and procedures, and a neglect by Mr. Bildman to keep the parent company informed of these problems at its subsidiary.
>
> There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .
>
> According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.
>
> Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company. . . .

Astra also issued a press release on June 26 containing identical statements.

At a press conference on June 26, Johansson stated:

> In December, Mr. Bildman informed me that a journalist was making inquiries about Astra USA that included questions about alleged sexual harassment at the company. Mr. Bildman assured me that there was nothing to worry about He also did not mention that he himself was a focal point of the inquiries.
>
> Mr. Bildman was asked on a number of occasions after that whether any of the allegations

involved him. He was also asked whether Astra USA had anything to be ashamed of He said no.

On April 19, we received in Sweden a letter from *Business Week*. . . We were shocked by what we read. . . .

Mr. Bildman refused to cooperate with the investigation. . . .

Mr. Bildman was terminated because he violated the trust that had been placed in him by the Astra Group. His style of leadership was unacceptable. And certain of his actions were unprofessional and hurtful to the morale of the employees.

Our investigation also found that Mr. Bildman exhibited inappropriate behavior at company functions, primarily internal sales meetings held off company premises. . . .

There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .

Our investigation also showed that Mr. Bildman went to great lengths to keep his behavior secret from his superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company.

According to our investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.

In all of these activities, Mr. Bildman displayed a disregard for both established rules and proce-

> dures of the Astra Group and for the high ethical principles that are implicit in our corporate culture. . . .
>
> Because of the unprofessional actions of one person in one of our 45 subsidiaries, the Astra name has become associated with activities that are the complete opposite of the high ethical and moral principles for which we have been known for over eight decades. . . .
>
> But there is no doubt that Lars Bildman abused his power as President of Astra U.S.A. Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra. . . .
>
> This is the end of an unfortunate and distasteful chapter in the history of Astra U.S.A.

Following his suspension and termination, Bildman became severely depressed. He experienced difficulty sleeping and suffered from stomach aches. (7/30/01 Bildman Aff. ¶ 29). He met with a psychiatrist through October of 1996 and was prescribed prozac and klonopin. (7/30/01 Bildman Aff. ¶ 29). When Bildman was terminated, Astra's Human Resources Department determined all amounts he had earned or vested under the applicable compensation, bonus and benefit plans, and distributed said amounts according to the terms of the plans and certain orders of the Norfolk County Probate Court.[4] (Tetrault Aff. ¶ 8).

At the time of his termination, Bildman was a participant in Astra's Long Term Management Stock Plan and its Profit Sharing Plan. Under his Employment Agreement, Bildman was also entitled to participate in the Executive Bonus Program, which

---

[4] Bildman was in the process of obtaining a divorce in Norfolk County Family and Probate Court Action No. 96D-2672-DIV.

entitled him to earn a bonus above his base salary depending on Astra AB's performance. (6/30/01 Bildman Aff. ¶ 12; Tully Dep., p. 96). Although Astra paid Bildman executive bonuses for 1993 and 1994, it never paid him executive bonuses earned for 1995 and 1996.

Participants in the Long Term Management Stock Plan are eligible for annual grants of Astra AB common stock but may only earn stock rights over a period of years if certain performance goals are achieved. (Ex. 2 to Tetrault Aff., p. 4). Following the expiration of the required three year holding period, on January 1, 1996, Bildman received a distribution of 7,172 shares of stock, with a value of $286,808. (Tetrault Aff. ¶ 9d). A portion of Bildman's potential executive bonus had been shifted to the Stock Plan. (Tully Dep., p. 96). Accordingly, on March 13, 1996, Bildman received a 1996 Award Statement and executed a Letter Agreement for the grant of Astra AB stock equal to $150,000 for the 1996 plan year, with 25 percent of the grant to be earned in each year in which pre-established performance goals were met. (Ex. 3 to Tetrault Aff.). Since the first performance objective was not measured until the end of 1996, Bildman did not and could not have met it as of the date of his termination. (Tetrault Aff. ¶ 9g). The 1996 Award Statement was also subject to the terms of the Stock Plan, which provided that upon termination for cause, "no shares shall be released to the Participant unless performance objectives and the Holding Period have been satisfied. Shares for which the performance objectives and Holding Period have not been satisfied shall be forfeited."

The Profit Sharing Plan entitled Bildman to obtain compensation based on the performance of Astra AB.

The Plan states that "[i]f a Participant's employment is terminated for any reason other than his death, Disability or attainment of Normal Retirement Age, he shall be entitled to receive his vested Account balance." (Ex. 5 to Tetrault Aff.). Bildman's vested account balance as of June 30, 1996 was $90,917.77. (Tetrault Aff ¶ 10c). Astra distributed this balance to Bildman and his former wife in accordance with a May 12, 1998 Order of the Norfolk Probate and Family Court. (Tetrault Aff. ¶ 10(e)). According to Bildman, although Astra paid him profit sharing for 1993 and 1994, it never paid him profit sharing earned for 1995 and 1996. (6/30/01 Bildman Aff. ¶ 12).

On January 26, 1998, following several days of trial in the local United States District Court before the Honorable Nathaniel Gorton, Bildman pleaded guilty to Counts 27 through 29 of a Superseding Indictment which charged him with committing the crime of willfully making and subscribing a tax return which he did not believe to be true and correct for the calendar years 1993, 1994 and 1995. Count 27 of the Superseding Indictment (False Tax Return 26 U.S.C. §7206(1)) stated:

> 29. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:
>
> 30. On or about April 15, 1994, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1993, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the

Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,008,548.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.

All in violation of Title 26 United States Code, Section 7206(1).

Count 28 of the Superseding Indictment (False Tax Return 26 U.S.C. § 7206(1)) stated:

31. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:

32. On or about October 24, 1995, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1994, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,030,916.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.

All in violation of Title 26 United States Code, Section 7206(1).

Count 29 of the Superseding Indictment (False Tax Return 26 U.S.C. § 7206(1)) stated:

> 33. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:
>
> 34. On or about April 14, 1996, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1995, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,124,373.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.
>
> All in violation of Title 26 United States Code, Section 7206(1).

Paragraphs 1 through 7 and 10 through 21 of the Superseding Indictment allege a conspiracy whereby Bildman and Lars Magnusson obtained over one million dollars worth of personal benefits, including home improvements, landscaping, home furnishings, personal vacations and prostitutes, which were allegedly paid by Astra under the guise of business expenses.

In a change of plea hearing on January 26, 1998, an Assistant United States Attorney ("AUSA") told

the court that "Mr. Bildman is offering a plea to Counts 27, 28 and 29, Paragraph 30, 32 and 34 contained in those." The AUSA then stated that "the full conversation in chambers was that the preliminary paragraph in each of those counts incorporates by reference some of the earlier language in the indictment. The Government does not understand Mr. Bildman to be pleading to the fraud language but is relying upon the language which is—which lays out the items of income which Mr. Bildman received, and in that extent alone the Government is relying upon that introductory paragraph." Bildman's attorney stated that he understood, "Not as to each and every item, but certainly the substantial number of items which constitute the false statement in the tax return."

When the court asked the AUSA what facts the Government would prove if the matter proceeded through trial, the AUSA stated:

> as the government outlined in its opening statement and so as to not repeat each and every thing that was said during the opening statement, I will rely upon that; but as the Government set forth in its opening statement, Your Honor, the Government would prove beyond a reasonable doubt that should this trial continue to a verdict, that Defendant Bildman received goods and services which were taxable to him, that he knew that those goods and services were to be reported on his Individual Income Tax Return, Form 1040, and that he did not report the value of those goods and services on his Income Tax Returns filed with the United States under the penalties of perjury on or about the dates set forth in Counts 27 through 29 Your Honor.

(Ex. 6 to Bildman Dep. pp. 5-12, 5-13). Bildman agreed with this statement of the facts. (Ex. 6. to Bildman Dep., p. 5-13). At the sentencing hearing, the court found that Bildman's unreported income was in excess of $1 million and that Bildman used a sophisticated means to impede the discovery of his crime.

On February 4, 1998, Astra U.S.A. filed Civil Action No. 98-0580 against Bildman, alleging fraud in Count I of the complaint, breach of fiduciary duty in Count II, waste of corporate assets in Count III and conversion in Count V. The complaint sought recission of the Employment Agreement in Count IV. Also on February 4, Ivan Rowley, President of Astra U.S.A., announced a settlement of sexual harassment charges against the company, stating:

> In May, 1996, the Equal Employment Opportunity Commission initiated its investigation into allegations of sexual harassment at Astra USA. Before that, Astra had begun its own internal investigation and had suspended the CEO and two other senior executives. Astra took these actions immediately after learning of the allegations.
>
> Astra's cooperation with the EEOC investigation was a natural extension of Astra's own investigation and other steps already taken by the company. Our cooperation was based on a common desire with the EEOC to get at the truth and rectify whatever damage had been done to current and former Astra employees.

On February 5, 1998, Astra U.S.A. issued a press release containing identical statements.

Also on February 5, the *Boston Globe* published an article entitled "$10M Astra Settlement is Expected" which stated:

> A federal agency is expected today to announce that Astra USA Inc. agreed to pay $10 million to settle allegations of sexual harassment and attempts to cover it up during the scandalous tenure of ousted chief executive Lars Bildman. . . .
>
> Astra USA said it wants "any amounts paid as a result of the investigation" by EEOC. Sources familiar with the negotiations put the settlement at $10 million. . . .
>
> "His actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company," Astra USA's spokesman, Benjamin Kincannon, said yesterday.

The *Middlesex News* published an article on February 5 entitled "Astra Settles Federal Harassment Suit: Record Setting Deal Ends EEOC Probe" which reported Astra's filing of a lawsuit against Bildman and stated: "Kincannon said that the rest of the damages would cover legal costs, including the cost of an internal investigation in early 1996. Astra's lawsuit also demands that Bildman repay the company for any fines and settlements from the EEOC investigation." On February 6, 1998, the *Boston Herald* published an article entitled "Astra-Nomical: firm settles sex harass claims for $9.85 Million" which also referred to Astra's civil suit stating: "Astra admitted the suit is partly an effort to stick the former CEO with the bill for EEOC settlement."

Thereafter, on April 28, 1999, Bildman filed Civil Action No. 99-1942 against Astra AB, Mogren and

Johansson, alleging intentional interference with contractual relations in Count I of his complaint and intentional infliction of emotional distress in Count II

On October 12, 2000, Bildman filed an amended counterclaim and third-party complaint against Astra, Mogren and Johansson in Civil Action No. 98-0580. Count I of the counterclaim alleges breach of contract against Astra; Count II seeks indemnification from Astra for costs and expenses incurred in this action; Count III seeks indemnification for costs and expenses incurred in connection with the 1998 indictments and Counts IV, VI and VII[5] allege libel against Astra, Mogren and Johansson.

## DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

---

[5] The counterclaim does not include a Count V.

I. Cross-Motions for Summary Judgment on Count I of Bildman's Counterclaim

Count I of Bildman's counterclaim alleges that Astra breached the June 15, 1996 Employment Agreement by refusing to pay him bonuses and other compensation earned before his suspension on April 28, 1996 and his termination on June 25, 1996. Count I also alleges that Astra breached the Employment Agreement by refusing to pay Bildman's reasonable legal fees and expenses incurred in challenging his termination and enforcing his rights under the agreement. Astra moves for summary judgment on this count, asserting that because it had cause to terminate Badman under the Employment Agreement, it has no further obligations to him with respect to either compensation or legal fees.

It is well-established that a material breach of contract by one party excuses the other party from future performance under the contract *Quintin Vespa Co. Inc. v. Construction Serv. Co.*, 343 Mass. 547, 554 (1962); *Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171, rev. den., 424 Mass. 1108 (1997). Paragraph 4(f) of the Employment Agreement provides that upon termination for cause under that paragraph, Astra U.S.A. "shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant." However, the Profit Sharing Plan entitles an employee who is terminated for cause to receive his vested account balance, and therefore Astra is not relieved of its obligations under the plan by virtue of Bildman's alleged material breach of the Employment Agreement. See *Walsh v. Atlantic Research Assoc., Inc.*, 321 Mass. 57, 62-63 (1947) (concluding that employee

who was justifiably terminated for materially breaching his employment contract could still recover earned compensation where contract so provided). On the present summary judgment record, an issue of disputed fact exists with respect to whether Astra has satisfied its obligations under the Profit Sharing Plan. Thus, Astra is not entitled to judgment as a matter of law on Count I insofar as it alleges breach of contract based on profit sharing.

Count I of Bildman's counterclaim also alleges that Astra breached the Employment Agreement by failing to pay him an executive bonus, part of which was earned under Astra's Stock Plan. Under the Stock Plan, an employee terminated for cause forfeits any unvested shares. Astra contends that the summary judgment record demonstrates as a matter of law that it properly terminated Bildman for cause.

Paragraph 4(f) of the 1993 Employment Agreement between Bildman and Astra U.S.A. provides in relevant part:

> The Employee's employment hereunder may be terminated for cause by the Company, effective immediately, by a vote of a majority of all of the members of the Board of Directors, on written notice to the Employee setting forth in reasonable detail the nature of such cause. For purposes of this Agreement, "cause" means only: (i) the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company, or (ii) other acts or omissions materially evidencing bad faith toward the Company, or (iii) conviction of the Employee of any criminal offense involving dishonesty or breach of trust or any felony. . . .

In order to properly terminate Bildman under Paragraph 4(j), Astra had to have a reasonable, good faith basis for believing he had engaged in misconduct which, under the terms of the Employment Agreement, would justify his termination. Compare *Goldhor v. Hampshire Coll.*, 25 Mass. App. Ct. 716, 722 (1987); *Klein v. President & Fellows of Harvard Coll.*, 25 Mass. App. Ct. 204, 208 (1987); *Hamilton v. Baystate Med. Educ. & Research Found.*, 866 F. Supp. 51, 55 (D. Mass. 1994), aff'd, 66 F.3d 306 (1st Cir. 1995) (in absence of contractual definition, "just cause" permits termination of employee where there exists reasonable, good faith basis for employer dissatisfaction such as culpable or inappropriate behavior).

Astra contends that in analyzing whether there was cause to terminate Bildman, this Court must give deference to the Board of Directors' decision under the business judgment rule, which shields officers and directors from liability for corporate decisions made in good faith after due care. See *Abbot v. Waltham Watch Co.*, 260 Mass. 81, 93 (1927); *Resolution Trust Corp. v. Gladstone*, 895 F. Supp. 356, 369 (D. Mass. 1995). Compare *Foster v. Churchill*, 626 N.Y.S.2d 115, 118 (A.D. 1 Dept. 1995), aff'd, 87N.Y.2d 744 (1996) (concluding that under Delaware law, business judgment rule applied to company's decision to terminate two officers, affording presumption that decision made in good faith and in company's best interest). However, the business judgment rule does not apply where a plaintiff alleges and demonstrates self-dealing by the board, or bad faith or unreasonableness in the investigation leading to the board decision. See *Harhen v. Brown*, 431 Mass. 838, 844-847 (2000) (discussing corporate board's decision not to pursue litigation demanded by shareholders); *Johnson v. Witowski*, 30 Mass. App. Ct. 697, 712, rev. den.,

411 Mass. 1104 (1991) (discussing board's approval of corporate acquisition transaction).

Because the summary judgment record raises a fundamental underlying dispute as to whether the Board's investigation of Bildman and decision to terminate him were undertaken objectively, fairly and in good faith, at least for purposes of the present motions this Court will not afford the Board's decision any deference or presumption of good faith. See, e.g., 7/30/01 Bildman Affidavit; Solvell Deposition, pp. 693-697; DeCof Deposition, pp. 82-83, 103, 121, 142; Clauss Deposition, pp. 6-9, 166-168; Ianelli Deposition, pp. 202-208; Aarons Deposition, pp.720-725; Lasagna Deposition, pp. 28-71; Bildman Exhibits 4, 11-17, 70, 72, 74, 76.

Astra contends that Bildman's plea to three tax felonies constitutes cause for termination under Paragraph 4(f) (iii) of the Employment Agreement as a matter of law.[6] Invoking the after-acquired evidence doctrine, Astra contends that Bildman's guilty plea on January 26, 1998 to filing a false tax return, because the improper tax filings occurred when he was Astra U.S.A.'s President, constitutes cause for termination under Paragraph 4(f)(iii) even though his plea was entered after his termination.

In the employment context, after-acquired evidence refers to evidence of an employee's wrongdoing, discovered by the employer after terminating the employee, that would have justified the employee's immediate termination had it been discovered

---

[6] Under Massachusetts law, a "conviction" occurs when there has been a finding of guilt by a jury or judge, entry of a formal guilty plea or admission to sufficient facts. *Commonwealth v. Jackson*, 45 Mass. App. Ct. 666, 670 (1998).

earlier. See *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 356 (1995). Many jurisdictions allow an employer to assert after-acquired evidence as a complete bar to an employee's contract-based wrongful discharge claim and to limit the measure of equitable relief and damages in statutory wrongful discharge claims such as those involving discrimination or retaliation under workers' compensation schemes. See Anna, "After-Acquired Evidence," 34 A.L.R. 5th 699 (1995); accord Restatement (Second) of Contracts § 237, comment c, illustration 8 (1979). Assuming without deciding that Massachusetts law allows an employer to assert after-acquired evidence of an employee's misconduct as a complete bar to the employee's breach of contract claim,[7] Bildman's federal tax convictions nonetheless do not constitute a defense in the present case.

Astra has not cited, nor has this court found, authority in any jurisdiction establishing that an employee's conviction of a crime after his discharge may be used as after-acquired evidence to justify

---

[7] In the only Massachusetts case to address after-acquired evidence, the court held that with respect to a claim under G.L. c. 151B, an employer could not use after-acquired evidence of wrongdoing to justify an employee's termination. See *Boston v. Massachusetts Comm'n Against Discrimination*, 39 Mass. App. Ct. 234, 239-240 (1995). Similarly, the First Circuit has followed the reasoning of the Supreme Court with respect to statutorily-based wrongful discharge claims, concluding that because there is an overriding public policy at stake in such cases, after-acquired evidence of employee misconduct does not bar all recovery but rather limits the employee's damages. See *Nieves-Villanuera v. Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997) (claim under 42 U.S.C. § 1983 that discharge was due to employees' political affiliation); *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 519 (1st Cir. 1996) (claim that discharge was retaliation for employee's exercise of First Amendment rights).

termination under an employment contract permitting termination for conviction of a crime. Cf. *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992), modified, by *McKennon*, 513 U.S. 352 (concluding that employee's conviction of crime before his hiring, and his concealment of that conviction on his employment application, constituted after-acquired evidence which may provide defense to wrongful termination claim). Aside from cases involving after-acquired evidence of resume fraud, in all the reported cases the employee misconduct proffered as after-acquired evidence occurred during the term of the employment and thus provided a legal ground for terminating the employee at the time of the actual discharge. See, e.g., *McDill v. Environamics Corp.*, 757 A.2d 162, 165-166 (N.H. 2000) (after-acquired evidence that employee copied confidential facsimile before his termination); *Gassman v. Evangelical Lutheran Good Samaritan Sod., Inc.*, 921 P.2d 224, 225-226 (Kan. App. 1996), aff'd, 935 P.2d 743 (1997) (after-acquired evidence that before her termination, employee violated company policy by entering director's office without authorization and taking copy of videotaped meeting); *Schuessler v. Benchmark Mktg. & Consulting, Inc.*, 500 N.W.2d 529, 539-540 (Neb. 1993) (after-acquired evidence that vice-president, during employment, sexually harassed female employee).

In this case, although Astra contends that the misconduct underlying Bildman's convictions occurred while he was employed as President, the convictions themselves did not occur until after Astra had terminated his employment. The convictions thus could not have provided "cause" for Bildman's discharge on the date of his termination, June 25, 1996. Accordingly, Astra is not entitled to summary judgment on Count I of Bildman's counterclaim on the ground that

Bildman's conviction of the federal tax felonies constitutes cause for his termination under Paragraph 4(f)(iii) of the Employment Agreement.

Astra also moves for judgment as a matter of law under Paragraph 4(j)(i) of the Employment Agreement, which provides that "the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company" constitutes cause for termination. Astra contends that in the course of pleading guilty to three counts of filing a false tax return in violation of 26 U.S.C. § 7206(1), Bildman admitted that he received the benefit of home renovations, prostitutes and family vacations paid for by Astra and is thus collaterally estopped from relitigating in this action whether he in fact received such benefit. Therefore, according to Astra, Bildman as a matter of law committed theft or fraud sufficient to justify his termination. Specifically, Astra argues that by pleading guilty to Counts 27, 28 and 29 of the Superseding Indictment, Bildman admitted the factual allegations underlying those charges and incorporated by reference therein. Bildman, however, denies admitting to those underlying facts. He claims that he pleaded only to Paragraphs 30, 32 and 34 of Counts 27, 28 and 29, which contain allegations concerning the legal elements of the crime of filing a false tax return but do not contain or incorporate by reference any of the specific facts underlying the charges.

Under the doctrine of collateral estoppel, or issue preclusion, when an issue of fact or law is actually litigated and determined by a final judgment, and the determination is essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a differ-

ent claim. *Treglia v. MacDonald*, 430 Mass. 237, 240 (1999); *Fireside Motors, Inc. v. Nissan Motor Corp.*, 395 Mass. 366, 372 (1985). The purpose of collateral estoppel is to conserve judicial resources, prevent unnecessary costs associated with multiple litigation, and ensure finality of judgments. *Treglia v. MacDonald*, 430 Mass. at 240. The party asserting collateral estoppel bears the burden of showing that all prerequisites to its application exist. *Carrasquillo v. Commonwealth*, 422 Mass. 1014, 1015 (1996); *Fireside Motors, Inc. v. Nissan Motor Corp.*, 395 Mass. at 373.

A party to a civil action against a former criminal defendant may invoke collateral estoppel to preclude the defendant from relitigating any issue actually decided in the criminal prosecution. *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 742 (1985). Here, a careful examination of Bildman's plea hearing reveals that he did not specifically admit to the facts underlying the charges which alleged that his unreported income consisted of home renovations, prostitutes or family vacations paid for by Astra.[8] Thus, Bildman's guilty pleas do not establish as a matter of law that Astra had cause to terminate him under

---

[8] This same conclusion was earlier reached by another judge of this Court. In a Memorandum of Decision and Order dated June 15, 1998, Judge Kottmyer denied Bildman's motion for an order requiring Astra to provide advance payment of expenses incurred in defending this suit, noting that "while Bildman's admission that he received the services described in the indictment was material to and a necessary predicate for the guilty pleas, the question whether Astra approved payment of these expenses was left open by the guilty pleas. Further, whether Bildman personally obtained a financial profit to which he was not legally entitled is not established by the guilty plea. Because the factual basis of the guilty pleas did not encompass allegations of fraud on Astra, indemnification is not barred . . ."

Paragraph 40(i) of the Employment Agreement for "the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company."

Indeed, although Bildman admits that the expenditures at issue were not explicitly authorized by Astra U.S.A.'s Board, he has proffered evidence which creates an issue of disputed fact with respect to whether he as President was subject to Astra's Travel and Expense Policy, whether family vacations and escort services fell within his broad authority as President to incur expenses so long as the expenses served a business purpose and were within budget, whether use of Astra contractors for personal services violated Astra policy, whether other Astra executives also charged personal work by Astra contractors to the company and whether he either paid various landscaping and architectural contractors directly or received their services gratis as a personal favor. See, e.g., 6/30/01 Bildman Affidavit; 7/30/01 Bildman Affidavit; Zimmerman Affidavit; Yon Deposition, Vol. IV, pp. 145-146; Morash Deposition, pp. 136-142.

Astra next contends that it properly terminated Bildman for cause under Paragraph 4(j)(ii) of the Employment Agreement for committing numerous acts which constituted a breach of fiduciary duty to Astra, thus "materially evidencing bad faith toward the Company." First, Astra argues that Bildman's violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et. seq.*, ("FECA") constituted a breach of fiduciary duty warranting his termination because such violations exposed the company to potential liability. It is undisputed that on two occasions Bildman authorized reimbursement of Astra employees with Astra funds for campaign contributions to federal

candidates for office, in violation of 2 U.S.C. § 441b(a). However, the undisputed evidence also shows that Bildman did not intentionally violate FECA but at worst was negligent in signing expense reports without reading each individual item and perhaps in failing to seek the advice of counsel with respect to whether campaign contributions could properly be reimbursed.

Under Massachusetts law, a corporate officer has a fiduciary duty to act in good faith and with reasonable intelligence and will not be held responsible for mere error of judgment or lack of prudence unless it rises to the level of clear and gross negligence. *Allied Freightways, Inc. v. Cholfin*, 325 Mass. 630, 634 (1950); *Murphy v. Hanlon*, 322 Mass. 683, 686 (1948); *Spiegal v. Beacon Participations, Inc.*, 297 Mass. 398, 410-411 (1937). Compare G.L. c. 156B, § 65 (stating that a corporate officer shall perform his duties with such care as an ordinarily prudent person in a like position would use under similar circumstances). Astra has not cited nor has this court found any case stating that, as a matter of law, a corporate officer's unintentional violation of a statute which exposes the company to potential liability constitutes a breach of fiduciary duty. Cf. *Miller v. AT&T Co.*, 507 F.2d 759, 762-763 (3d Cir. 1974) (concluding that shareholder complaint stated claim for breach of fiduciary duty by alleging that corporate directors violated FECA by making $1.5 million contribution to the DNC and that said contribution constituted corporate waste). No evidence in the summary judgment record shows that Bildman's signing of the expense report without examining each individual item or his failure to recognize a FECA violation constitutes gross negligence so as to constitute a breach of fiduciary duty under Massachusetts law.

Finally, to the extent that Astra invokes Paragraph 4(j)(ii) of the Employment Agreement, that paragraph defines cause as "acts or omissions materially evidencing bad faith toward the Company." In the context of corporate law, bad faith is not simply poor judgment or mere negligence but rather implies a dishonest purpose or conscious wrongdoing. *Spiegal v. Beacon Participations, Inc.*, 297 Mass. at 416. No evidence in the summary judgment record demonstrates that Bildman's violation of FECA involved bad faith. Accordingly, Astra is not entitled to summary judgment on the ground that Bildman's FECA violations constituted cause for his termination.

Astra also contends that Bildman's admission that he secretly taped conversations with other Board members and Astra officers constitutes a breach of fiduciary duty which materially evidences bad faith toward the company, justifying his termination under Paragraph 4(j)(ii) of the Employment Agreement. Astra does not cite nor has this Court found any authority for the proposition that the secret tape recording by a corporate officer of his conversation with another corporate officer constitutes as a matter of law a breach of fiduciary duty. Cf. *Peterson v. West*, 122 F Supp. 2d 649, 656-657 (W.D. N.C. 2000) (concluding employee's act of secretly taping a conversation with his superior, coupled with numerous other acts of insubordination, constituted legitimate, nondiscriminatory reason for terminating him); *Ingram v. Pre-Paid Legal Serv., Inc.*, 4 F. Supp.. 2d 1303, 1313 (E.D. Okla. 1998) (concluding employee's secret tape recording of conversations with his supervisors constituted insubordination justifying termination); *Fouraker v. Publix Super Markets*, 959 F. Supp. 1504, 1509-1510 (M.D. Fla. 1997) (concluding employee's act of tape recording a meeting with his superiors in

violation of supervisor's orders not to record such meetings was insubordination justifying his termination). In addition, the summary judgment record reveals a disputed issue of fact as to whether the tape recording of conversations among officers and directors, without disclosure and permission, was a common practice at the company. See Bildman Deposition Vol. I, pp. 163-165. Accordingly, Astra is not entitled to judgment as a matter of law on the ground that Bildman's taping of telephone conversations constitutes cause for his termination.

Astra next contends that Bildman was insubordinate in contacting Astra employees during the investigation in violation of the Directors' order not to do so and that this constitutes a breach of fiduciary duty justifying his termination. Whether refusal to obey an employer's order amounts to insubordination justifying termination depends on the reasonableness and importance of the order when given, the degree of discretion entrusted to or required of the employee in performing his duties, and other circumstances involved. *Mansfield v. Lang*, 293 Mass. 386, 395-398 (1936) (concluding that whether treasurer/general manager's termination for disobeying orders concerning charitable contributions and the use of credit was justified on ground of insubordination was a matter for the jury where there was evidence that the termination was a pretext); *Crabtree v. Bay State Felt Co.*, 227 Mass. 68, 70-71 (1917) (concluding that court properly refused to find, as a matter of law, that factory superintendent's refusal to appear at board of director's meeting after sufficient notice of meeting justified dismissal where there was evidence that relations between superintendent and directors were strained and that the meeting was not ordinary business conference but a pretext to subject the

superintendent to examination by company counsel). In this case, given the conflicting evidence as to whether the Board's investigation of Bildman was undertaken objectively, fairly and in good faith, this Court cannot say as a matter of law that Bildman's disobedience to the Board breached his fiduciary duty and constituted insubordination justifying termination.

Astra also argues that Bildman's refusal to cooperate with the Board's investigation following his suspension constitutes a breach of fiduciary duty justifying his termination. Case law in Massachusetts supports the proposition that, generally, an employee's refusal to cooperate with an investigation by the employer of the employee's performance of job duties is a proper ground for termination. See *Massachusetts Parole Bd. v. Civil Service Comm'n*, 47 Mass. App. Ct. 760, 765-766, rev. den., 430 Mass: 1111 (1999) (concluding that public employee was properly terminated for failing to appear at investigatory interview, despite his good faith reliance on attorney's erroneous advice that he had constitutional right not to appear); *Nuzzo v. Northwest Airlines, Inc.*, 887 F. Supp. 28, 32-33 (D. Mass. 1995) (concluding that employee was properly terminated for refusing to cooperate with employer's investigation into whether he was involved in employee credit card and mail theft); see also *McKenzie v. Brigham & Women's Hosp.*, 405 Mass. 432, 437 (1989) (under G.L.c. 151B, hospital employee's refusal to cooperate with hospital's investigation of narcotics theft was legitimate, non-discriminatory reason for employee's termination). Those cases, however, address the refusal to cooperate of an ordinary employee, as opposed to a corporation's highest ranking officer. Here again, given the conflicting evidence in the summary judgment record as to whether the investigation at issue was undertaken objectively, fairly

and in good faith or was a pretext to terminate Bildman, this Court cannot say as a matter of law that Bildman's refusal to cooperate breached his fiduciary duty and constituted cause for his termination. See *Mansfield v. Lang*, 293 Mass. at 395-398; *Crabtree v. Bay State Felt Co.*, 227 Mass. at 70-71.

Astra next contends that Bildman's use of Astra funds to pay personal legal fees, without authorization from the Board, constitutes a breach of fiduciary duty and justifies his termination. Corporate fiduciaries are bound by their duty of loyalty to subordinate their personal self-interests to the well being of the corporation and are prohibited from using the corporation for their personal benefit in a manner detrimental to the corporation. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 529 (1997); *Coggins v. New England Patriots Football Club, Inc*, 397 Mass. 525, 534 (1986); *Seder v. Gibbs*, 333 Mass. 445, 453 (1956). The present summary judgment record reveals a disputed factual issue as to whether charging the personal legal fees at issue to Astra U.S.A. was a benefit to which Bildman was entitled as an expatriate or within his authority and discretion as President and CEO of the company. See, e.g., 7/30/01 Bildman Affidavit; Tully Deposition, pp. 25-32, 42-43. Accordingly, Astra is not entitled to judgment as a matter of law on this basis.

Finally, Astra contends it had cause to terminate Bildman because he breached his fiduciary duty and evidenced bad faith by failing to disclose to the Board that he received, without charge, landscaping and architectural services from companies under contract with Astra, that he was a principal object of the Business Week investigation and that he had authorized the settlement of several sexual harassment

claims against him with company funds. Corporate officers have a continuing fiduciary duty of full and honest disclosure concerning all matters relevant to the company's operation. See *Mendelsohn v. Leather Manuf. Corp.*, 326 Mass. 226, 232-233 (1950); *Geller v. Allied-Lyons PLC*, 42 Mass. App. Ct. 120, 125-126 (1997). However, the summary judgment record contains material factual disputes concerning the nature of the contractor arrangements and whether they should have been disclosed and whether the sexual harassment claims and their settlement were in fact disclosed to Astra U.S.A. Board members. See, e.g., Zimmerman Affidavit; Bildman Deposition pp. 355-358; Tully Deposition, pp. 125-127; 5/11/98 Bildman Affidavit ¶¶ 12, 24-31, 34.

Therefore, Astra is not entitled to judgment as a matter of law on Count I of Bildman's counterclaim on the ground that it properly terminated Bildman for cause, thus relieving it of any further obligations to him under the Employment Agreement. Given the factual disputes concerning whether Bildman was properly terminated for cause, this Court also denies Bildman's cross-motion for summary judgment on Count I of his counterclaim insofar as it alleges breach of the Employment Agreement for failure to pay him earned compensation.

Bildman's breach of contract counterclaim is also based on Astra's refusal to pay his reasonable legal fees and expenses under Paragraph 9 of the Employment Agreement, which states: "The Company shall pay to the Employee all reasonable legal fees and expenses incurred by him in contesting or disputing any termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement." Astra contends that its termination of

Bildman for cause relieves it of any obligation to him under this provision. Paragraph 4(f) of the Employment Agreement provides that "[i]n the event of the termination of the Employee under this Paragraph, the Company shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant." In response, Bildman emphasizes that Paragraph 9 states that it applies to "any termination" and argues that interpreting Paragraph 4(f) to relieve Astra of its obligations in the event of a termination for cause renders the phrase "any" meaningless.

The court construes all provisions of a contract together to make it a rational business instrument and a workable and harmonious means for effectuating the parties' intent. *Starr v. Fordham*, 420 Mass. 178, 192 (1995); *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 795 (1986). An interpretation which gives reasonable meaning to all provisions of a contract is preferred to one which renders a term or provision superfluous. *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 245 (1986); *Associated Credit Serv. Inc. v. City of Worcester*, 33 Mass. App. Ct. 92, 94, rev. den., 413 Mass. 1107 (1992). In addition to termination by Astra for cause, paragraph 4 of the Employment Agreement provides for termination by the employee with or without cause, termination by Astra without cause, and termination upon change of control of the company. The term "any" in Paragraph 9 is not superfluous but rather appears to be shorthand encompassing all these termination situations. With respect to a termination by Astra for cause, however, the specific limitation of Paragraph 4(f) controls the more general language of Paragraph 9. See *Lembo v. Waters*, 1 Mass. App. Ct. 227, 233 (1973). Whether

Astra is obligated to pay Bildman fees and expenses under Paragraph 9 thus depends on whether his employment was properly terminated for cause which, as noted, is a material issue of fact to be resolved at trial. Accordingly, the cross-motions for summary judgment on Count I of Bildman's counterclaim are denied insofar as they concern breach of Paragraph 9.

II. Cross-Motions for Summary Judgment on Count II of Astra's Complaint

The parties have filed cross-motions for summary judgment on Count II of Astra's complaint, which alleges that Bildman breached his fiduciary duty and duties of good faith and loyalty to Astra. The factual disputes which precluded entry of summary judgment for Astra on Bildman's breach of contract claim necessarily preclude entry of summary judgment on this count as well.

III. Astra's Motion for Summary Judgment on Remainder of Bildman's Counterclaim and Third Party Complaint

A. Indemnification Counts

Count II of Bildman's counterclaim seeks indemnification for costs and expenses incurred in the present action, and Count III of the counterclaim seeks indemnification for costs and expenses incurred by Bildman in connection with the federal tax indictments. Bildman asserts that he is entitled to indemnification under Article IX of Astra U.S.A.'s by-laws, which provides for indemnification of officers "to the full extent permitted by New York Business Corpora-

tion Law."[9] Section 722(a) of the New York Business Corporation Law provides in relevant part:

> A corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal . . . by reason of the fact that he . . . was a director or officer of the corporation . . . against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful. N.Y. Bus. Corp. §722(a) (Loislaw.com 2001).

Section 724(a) further provides that "[n]otwithstanding the failure of a corporation to provide indemnification . . . indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers)." N.Y. Bus. Corp. § 724(a) (Loislaw.com 2001).

---

[9] Despite the voluminous summary judgment filings, it does not appear that either party produced a copy of the relevant by-law in the summary judgment record. However, in an earlier decision on the issue of indemnification, this Court (Kottmyer, J.) referred to Article IX as the relevant provision. In any event, the parties do not dispute that New York Business Corporation Law governs this issue.

Astra contends that as a matter of law § 722 does not apply to an action in which a corporation sues its own officer or director for corporate wrongdoing. It is not clear wider New York case law whether § 722 authorizes indemnification of a corporate officer in a direct suit by the corporation alleging that the officer breached his fiduciary and contractual obligations to the corporation. Although such an action is literally one "by . . . the corporation to procure a judgment in its favor" and thus arguably is excluded from § 722, the term "by or in the right of the corporation" has been interpreted as a term of art referring to derivative suits. See *Mazur*, "Indemnification of Directors in Actions Brought Directly by the Corporation," 19 J. Corp. Law 201, 208-213 (1994) (discussing the legislative history of the N.Y. indemnification statutes). Because the present suit by Astra against Bildman is direct and not derivative, Bildman contends that it falls within § 722(a). This interpretation has some support in the case law. See, e.g., *Sequa Corp. v. Gelmin*, 828 F. Supp. 203, 207 (S.D.N.Y. 1993) (stating that New York indemnification statutes apply even where officer is sued by corporation for breach of fiduciary duty to that corporation); *Oantal Corp. v. Niemuller*, 771 F. Supp. 1372, 1373-1374 (S.D.N.Y. 1991) (concluding, in action by corporation against former officer, he was not entitled to advance payment of expenses because he failed to meet statutory requirements of § 724 by showing that expenses sought were reasonable and necessary).

Nonetheless, at least one court has concluded that § 722 does not authorize indemnification of a corporate officer in a direct suit by the corporation alleging wrongful conduct by the officer in breach of his fiduciary and contractual obligations to the corporation. See *Minami Int'l Corp.*, 1992 WL 58838, * 1 (S.D.N.Y.

1992) (concluding that § 722 does not apply to direct suit by corporation against officer for breach of contractual obligations to corporation). This is consistent with the basic principle that indemnification arises where two persons are subject to a duty to a third under such circumstances that as between them, one should perfonn it rather than the other. See *Biondi v. Beekman Hill House Apartment Corp.*, 692 N.Y.S. 2d 304, 309-310 (N.Y. App. Div. 1999). Given the state of uncertainty in New York law with respect to this issue, this Court declines to grant summary judgment on the ground that § 722 does not apply to direct actions by a corporation against its former officer.

Even assuming that § 722 does applies, Astra moves for summary judgment on the ground that as a matter of law Bildman cannot prevail because indemnification under § 722 is available only if the officer or director "acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful." N.Y. Bus. Corp. § 722(a) (Loislaw.com 2001). Thus, there is no right to indemnification where the conduct at issue in the suit is not within the scope of the corporate officer's employment, undertaken for the benefit of the corporation, such that the corporation is primarily responsible for such conduct. *Kaufman v. CBS, Inc.*, 135 Misc. 2d 64, 65 (N.Y. Civ. Ct. 1987) (denying indemnification in action against officer by employee alleging verbal and physical harassment); *Professional Ins. Co. of New York v. Barry*, 303 N.Y.S. 2d 556, 559 (N.Y. Sup. 1969) (discussing an earlier version of the statute). In this case, as noted, the record reveals a dispute with respect to whether Bildman in fact breached his fiduciary duty and

engaged in misconduct outside the scope of his employment. Accordingly, Astra is not entitled to judgment as a matter of law on Counts II and III of the counterclaim insofar as they seek indemnification under New York law.

Bildman also claims a right to indemnification under Paragraph 8 of the Employment Agreement, which provides that:

> The Company agrees to indemnify the Employee in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from and against any and all claims, damages, suits, costs, or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of this Agreement for any reason.

Chapter 156B, section 67, which permits but does not require indemnification for corporate directors, officers and employees, provides in relevant part:

> No indemnification shall be provided for any person with respect to any matter as to which he shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his action was in the best interest of the corporation . . . G.L. c. 156B, § 67 (2000).

The record reveals a factual dispute with respect to whether Bildman acted in good faith or breached his fiduciary duty and engaged in misconduct outside the scope of his employment. See, e.g., *Boston Children's Heart v. Nadal-Ginard*, 73 F.3d 429, 436438 (1st Cir. 1996) (concluding that denial of corporate officer's

claim for indemnification was proper where trial court found he was disloyal and breached his fiduciary duties to corporation). Cf. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 561-562 (1997) (finding corporate officer entitled to indemnification under by-laws where court failed to make an express finding that he acted in bad faith); *Dynan v. Fritz*, 400 Mass. 230, 245-246 (1987) (finding officers entitled to indemnification under corporate by-laws where court did not find that they acted in bad faith). Accordingly, Astra is not entitled to judgment as a matter of law on Counts II and III of the counterclaim insofar as they seek indemnification under Massachusetts law.

B. Defamation Counts

Astra moves for summary judgment on Counts IV, VI and VII of the counterclaim on the ground that Bildman has no reasonable expectation of demonstrating libel at trial. Count IV alleges that Astra made various defamatory statements with malice, and Count VI alleges that Astra made various defamatory statements negligently. Count VII alleges that certain statements by Astra constitute libel per se Astra contends that the statements identified by Bildman are either non-defamatory, true or privileged and that further, Bildman cannot meet his burden of showing that the defamatory statements were made with malice. To prevail on his libel claims, Bildman must demonstrate the publication by one without a privilege to do so of a false statement, of and concerning him, which ridicules him or treats him with contempt. See *Correllas v. Viveiros*, 410 Mass. 314, 319 (1991); *McAvoy v. Ruffin*, 401 Mass. 593, 597 (1988).

Count VI

Count VI of Bildman's counterclaim alleges that Astra made the defamatory statements negligently. Astra contends that Bildman is a public figure who cannot recover on such a claim. Although private persons may recover for a negligent publication of a defamatory falsehood, public figures may recover only upon proof of actual malice. *Jones v. Taibbi*, 400 Mass. 786, 797 (1987); *Stone v. Essex County Newspapers, Inc*, 367 Mass. 849, 858 (1975). One who voluntarily injects himself or is drawn into a particular public controversy becomes a public figure for a limited range of issues. See *Jones v. Taibbi*, 400 Mass. at 798; *Materia v. Huff*, 394 Mass. 328, 331 (1985). Where the relevant facts are undisputed, whether a plaintiff is a limited public figure is a question of law. *Bowman v. Heller*, 420 Mass. 517, 520, cert. den., 516 U.S. 1032 (1995); *Materia v. Huff*, 394 Mass. at 330-331.

First, the defamatory statements at issue must involve a public controversy. A public controversy is a dispute in which the outcome affects the general public or a segment of it in an appreciable way. *ELM Med. Lab., Inc. v. RKO Gen, Inc.*, 403 Mass. 779, 786 (1989). Media attention alone does not transform a private controversy into a public one. *Bowman v. Heller*, 420 Mass. at 524. Here, Bildman was at the center of a federal sexual harassment investigation of a publicly-traded pharmaceutical company employing 1,000 people in Westborough, Massachusetts. Sexual harassment in the workplace is a matter of public concern, increasingly so over the last decade. Cf. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 133 (1998) (existence of multiple sexual harassment suits against youth hostel open to public was

matter of public concern). Accordingly, this Court concludes that there is a public controversy in this case.

Bildman's status must be determined by looking to the nature and extent of his participation in the public controversy at issue. See *Bowman v. Heller*, 420 Mass. at 522, 524. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 167 (1979); *Bowman v. Heller*, 420 Mass. at 525. Voluntary contact with the media will not necessarily result in the plaintiff being deemed a public figure. See *Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3 (1976). However, one who injects himself into the media limelight for the purpose of influencing the outcome of a controversy becomes a limited public figure with respect to those issues. *Gertz v. Welch*, 418 U.S. 323, 345 (1974); *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156 (1971).

Here, the summary judgment record reveals that Bildman, through counsel, repeatedly contacted and used the media including *Business Week*, the *Boston Globe* and the *Boston Herald* to comment on the investigation, deny and rebut Astra's allegations and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets including the *New York Times*, *Wall Street Journal*, Reuters, United Press, New England Cable News, CBS News and WCVB-TV, WLVI-TV and WHDH-TV in Boston. Bildman also entered into unsuccessful negotiations with CBS to be interviewed on its Evening News in New York and appeared in an interview on Swedish TV. This

undisputed evidence shows that Bildman was not merely drawn into the public controversy but also used the media limelight for the purpose of influencing the outcome of the controversy. Accordingly, I find and rule that he is a limited public figure for purposes of his defamation claims.

Where the plaintiff is a public figure, he must prove by clear and convincing evidence that the defendant published the allegedly defamatory statements with actual malice. *Milgroom v. News Group Boston, Inc.*, 412 Mass. 9, 10 (1992); *Tosti v. Ayik*, 394 Mass. 482, 491 (1985), cert. den., 484 U.S. 964 (1987). Actual malice requires a showing that the defendant published the statement with knowledge of its falsity or with reckless disregard of whether it was false; mere negligence is not enough. *Godbout v. Cousens*, 396 Mass. 254, 258 (1985); *Tosti v. Ayik*, 394 Mass. at 491. Thus, Astra is entitled to judgment as a matter of law on Count VI of Bildman's counterclaim, which alleges the negligent publication of defamatory statements.

COUNTS IV and VII

1. April 29 Speech to Astra Employees

In this speech, Johansson made the following statements:

> The first action is that Mr. Lars Bildman has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity.

> The second action taken yesterday was that a committee of the Board of Directors of Astra USA has retained independent counsel to assist it in performing the investigation. The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company.

Astra is correct that most of these statements are non-defamatory. A statement is defamatory if, considered in the context surrounding its publication, it discredits a person in the minds of any considerable and respectable class of the community. *Draghetti v. Chmielewski*, 416 Mass. 808, 810 (1994); *Milgroom v. News Group Boston*, 412 Mass. at 12. Whether a statement is reasonably susceptible of a defamatory meaning is a threshold question of law for the court, but where a statement is susceptible of both a defamatory and a non-defamatory meaning, it is a question of fact for the jury. *Draghetti v. Chmielewski*, 416 Mass. at 811; *Foley v. Lowell Sun Publ'g Co.*, 404 Mass. 9, 11 (1989). The announcement of an employee's suspension is not in itself defamatory, regardless of any inferences which others may draw as a result. *Goldhor v. Hampshire College*, 25 Mass. App. Ct. 716, 724 (1988). See also *Ricci v. Crowley*, 333 Mass. 26, 27 (1955) (statement that public official was removed "for the good of the service" not defamatory). Cf. *Disend v. Meadowbrook Sch.*, 33 Mass. App. Ct. 674, 676 (1992) (statement that teacher terminated could be defamatory where it also stated that she had been involved in an "incident" and was "inappropriate" in dealing with children). Here, the announcement that Astra had suspended Bildman and was conducting an investigation were non-defamatory statements merely describing steps the

company had taken. Cf. *Dragheti v. Chmielewski*, 416 Mass. at 812 (employer's statement that allegations against employee had been investigated and referred to the district attorney had defamatory meaning imputing criminal conduct).

In addition, truth is an affirmative defense to a claim of defamation. *McAvoy v. Shufrin*, 401 Mass. at 597. Where the uncontroverted facts show that the allegedly libelous statements are substantially true, the defendant is entitled to judgment as a matter of law. *Milgroom v. News Group Boston, Inc.*, 412 Mass. at 12. A plaintiff who is a public figure bears the burden of demonstrating the falsity of the allegedly defamatory statement. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 132 (1998). Here, the statements that Bildman had been suspended and that Astra was conducting an investigation were true.

The only issue is whether the statement "Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity" is capable of a defamatory meaning. Coming so early in the investigation, it could be viewed as a decision which was made for public relations reasons without regard to whether the allegations were borne out. So viewed, it is not defamatory. However, Bildman argues that this statement implies that the allegations against him were true. This Court finds that the inference drawn by Bildman is unreasonable and that the statement is not reasonably susceptible of a defamatory meaning. Accordingly, Astra is entitled to summary judgment on the defamation counts insofar as they are based on the April 29 speech.

2. April 29 News Release & April 29 Press Release

On April 29, Astra issued a news release entitled "Astra Elects New President and CEO," which stated, among other things:

> Mr Larsson replaces Lars Bildman, who has been suspended and relived of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. . . .
>
> The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company. . . .
>
> A preliminary investigation by senior company officials resulted in the decisions announced today.

The first two paragraphs of this news/press release are true, non-defamatory statements describing action taken by Astra. The mere announcement of Bildman's suspension and an investigation are not themselves defamatory regardless of any inferences which others may draw as a result. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724. Again, Bildman argues that the statement about the preliminary investigation implies evidence of wrongdoing and is thus defamatory. Although the summary judgment record reveals a dispute of fact as to whether Astra's investigation was undertaken objectively, fairly and in good faith, it is true that Astra had uncovered some evidence of wrongdoing at this point, which although perhaps not justifying termination, warranted suspension pending investigation. Assuming that the statement could reasonably be viewed as defamatory, Bildman has no reasonable

expectation of proving it to be false. Thus, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the April 29, 1996 news and press releases.

3. May 3 Boston Globe Article

On May 3, the *Boston Globe* published an article entitled "Astra: CEO Allegedly Harassed Women: Says suspended Bildman also tried to cover up actions" which stated in relevant part: "Bildman told executives at Astra USA's Stockholm parent company last December that a reporter was looking into sexual harassment claims at its US subsidiary, said Benjamin Kincannon, Astra U.S.A. spokesman. But 'he downplayed it,' Kincannon said."

Astra contends that this statement is non-defamatory and constitutes Astra's opinion. Statements of pure opinion based on disclosed or assumed non-defamatory facts are constitutionally protected and are not actionable. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. 376, 379 (1988); *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), *cert. den.*, 485 U.S. 962 (1988). The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. at 379; *King v. Globe Newspaper Co.*, 400 Mass. at 709. The court examines the statement in its totality in the context in which it was published, giving weight to any cautionary terms used by the person publishing the statement, and considering all of the circumstances surrounding the statement, including the medium by which it is disseminated and the audience to which it is published. *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 734 (1986); *Cole v. Westinghouse Broad. Co., Inc.*, 386

Mass. 303, 309, cert. den., 459 U.S. 1037 (1982). When a statement could reasonably be understood as either a factual assertion or an opinion, it is a question of fact for the jury to determine. *King v. Globe Newspaper Co.*, 400 Mass. at 709.

Where the meaning of statements is imprecise and open to speculation, and the statements are incapable of being proved true or false, they cannot be characterized as assertions of fact. *Cole v. Westinghouse Broad. Co., Inc.*, 386 Mass. at 312 (statements that a reporter was "sloppy and irresponsible" with "bad techniques" could not be proved false and could not reasonably be viewed as factual assertions). Bildman contends that Kincannon's statement is defamatory because it suggests that he lied about his involvement in sexual harassment. However, the word "downplayed" is imprecise and open to numerous interpretations and would be extremely difficult to prove true or false. Accordingly, Kincannon's statement can only reasonably be viewed as Astra's opinion or interpretation of Bildman's response and is not actionable. Astra is therefore entitled to summary judgment on the defamation counts insofar as they are based on the May 3 Boston Globe article.

4. May 13, 1996 Mogren Address

On May 13, 1996, Mogren addressed Astra's Annual Meeting on the issue of "Improprieties at Astra USA, Inc." and stated: "the CEO and two colleagues of the American subsidiary were suspended." This statement is simply a true, non-defamatory statement describing action taken by Astra and cannot form the basis of Bildman's libel claim. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724.

Mogren also stated:

> But as a result of preliminary investigation at the end of April, we were able to confirm that a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole . . . .
>
> Concerning the sexual harassment now in question, it should be said that what has occurred is at best a violation of good style and form. At worst, a number of our employees have also been caused inconveniences or suffering. To the extent this may have occurred, we are deeply regretful. We will do everything we can to prevent it from ever happening again. . . .
>
> As soon as we in Astra's corporate management, through our preliminary investigation, were practically certain that something serious had happened, we swiftly set in a number of measures.
>
> What has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened.

Astra argues that these statements are non-defamatory. These statements are reasonably susceptible of a defamatory meaning because they suggest wrongdoing by Bildman including inappropriate behavior toward employees, violation of company rules and deceit. Cf. *DelloRusso v. Montiero*, 47 Mass. App. Ct. 475, 476 (1999) (statement that employee's work habits were inconsistent with employer's standards was defamatory). This would at least appear to be a

question for a jury. See *Draghetti v. Chmielewski*, 416 Mass. at 811.

Astra also argues that these statements are non-actionable opinion. Mogren's statements that "a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole" and that "what has occurred is at best a violation of good style and form" are too imprecise and subjective to be characterized as assertions of fact. See *Cole v. Westinghouse Broad. Co., Inc.*, 386 Mass. at 312. These statements are not easily capable of being proved true or false.

However, the statement that "what has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened" can reasonably be viewed as a factual assertion that Bildman abused his authority and engaged in deceit. Even if deemed to be Astra's opinion, a statement cast in the form of opinion is actionable if it implies the existence of undisclosed defamatory facts on which the opinion purports to be based. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. at 380; *King v. Globe Newspaper Co.*, 400 Mass. at 713. Cf. *Judd v. McCormack*, 27 Mass. App. Ct. 167, 175 (1989) (employer's statement that firefighter lacked necessary psychological and physical skills to perform effectively was non-actionable opinion where letter set forth specific facts on which that conclusion was based); *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 (D. Mass. 1996) (employer's statement that employee was unprofessional and had performance problems was protected opinion where its basis was disclosed). To the extent that the "cover up"

statement is interpreted as Astra's opinion, it implies that the company has undisclosed defamatory facts to support it. Finally, although Astra contends that this statement is true, the summary judgment record reveals a dispute as to the truth of these matters.

Astra further argues that Mogren was privileged to make these statements at Astra's annual meeting. An employer has a conditional privilege to disclose defamatory information concerning an employee where the publication is reasonably necessary to protect or further the employer's legitimate business interest. See *Foley v. Polaroid Corp.*, 400 Mass. 82, 95 (1987); *Bratt v. International Bus. Mach. Corp.*, 392 Mass. 508, 509 (1984). There is also a conditional privilege when the publisher of a statement and its recipient have a common interest in the subject and the statement furthers that interest. *McCone v. New England Tel. & Tel. Co.*, 393 Mass. 231, 235 (1984); *Humphrey v. National Semiconductor Corp.*, 18 Mass. App. Ct. 132, 133, *rev. den.*, 393 Mass. 1102 (1984). These conditional privileges are ones of publication to the narrow class of people who share a legitimate interest in the publication. *Draghetti v. Chmielewski*, 416 Mass. at 813-814.

Here, Mogren had a privilege to discuss the allegations and investigation into possible illegal behavior and corporate wrongdoing internally within the company. *Bratt v. International Bus. Mach. Corp.*, 392 Mass. at 513-515. *Compare Draghetti v. Chmielewski*, 416 Mass. at 814 (no privilege for police chief to publish to news reporter statements concerning evidence of wrongdoing in investigation against officer).

Once the defendant meets its burden of showing the existence of a privilege, the burden shifts to the

plaintiffto show abuse of the privilege. *McCone v. New England Tel. & Tel. Co.*, 393 Mass. at 236; *Judd v. McCormack*, 27 Mass. App. Ct. 167, 173 (1989). A conditional privilege immunizes the defendant from liability unless he acted with actual malice or acted recklessly by unnecessary, unreasonable or excessive publication. *Milgrew v. Taunton*, 410 Mass. 631, 635 (1991); *Bratt v. International Bus. Mach. Corp.*, 392 Mass. at 509; *Humphrey v. National Semiconductor Corp.*, 18 Mass. App. Ct. at 134. With respect to a conditional privilege, actual malice may be shown by evidence that the defendant had an improper motive in publishing the statement, acted with ill will toward the plaintiff or abused the privileged occasion as a pretense. *Ezekiel v. Jones Motor Co., Inc.*, 374 Mass. 382, 390-391 (1978); *Gindall v. First Nat'l Stores, Inc.*, 330 Mass. 557, 559 (1953); *Judd v. McCormack*, 27 Mass. App. Ct. 167, 175 (1989). There is a dispute in the summary judgment record as to whether Astra's investigation was undertaken objectively, fairly and in good faith, or whether it was fueled by an ulterior motive to oust Bildman from the company. Cf. *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373, 1380 -1381 (D. Mass. 1980), aff'd, 636 F.2d 1199 (1st Cir. 1980), cert. den., 454 U.S. 821 (1981) (employer entitled to judgment as matter of law with respect to accusation that employee committed crime where record was abundantly clear that employer made good faith, thorough investigation). Thus, there is an issue of fact with respect to whether Mogren made the statement with malice so as to deprive Astra of its conditional privilege.

Nonetheless, because Bildman is a public figure, he must meet a higher standard of malice in order to defeat summary judgment. Improper motive or ill will is not sufficient to demonstrate malice in the

constitutional sense. *Rotkiewicz v. Sadowsky*, 431 Mass. 748, 755 (2000); *Tosti v. Ayik*, 394 Mass. 482, 491 (1985); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 866 (1975); *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. 6, 16 (1984). Actual malice in the constitutional sense requires proof that the defendant published the statement with knowledge of its falsity or with reckless disregard of whether it was false. *Godbout v. Cousens*, 396 Mass. at 258; *Tosti v. Ayik*, 394 Mass. at 491. The issue is the defendant's attitude toward truth or falsity and not his attitude toward the plaintiff. *Rotkiewicz v. Sadowsky*, 431 Mass. at 755.

To prove reckless disregard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *Milgroom v. News Group Boston, Inc.*, 412 Mass. at 11; *Tosti v. Ayik*, 394 Mass. at 491. For example, actual malice may in some circumstances be shown by evidence that the defendant published a statement without investigation or verification and with knowledge that the only information he had was hearsay. See *King v. Globe Newspaper Co.*, 400 Mass. at 721-722. Malice may also be inferred where there are obvious reasons to doubt the veracity of an informant relied upon or the accuracy of his reports. *Id.* at 722; *Lyons v. New Mass. Media, Inc.*, 390 Mass. 51, 57 (1983). Actual malice involves a subjective test; however, because it would be rare for a defendant to admit having doubts about his publication, the jury is entitled to draw inferences as to the defendant's state of mind from the objective evidence. *McAvoy v. Shufrin*, 401 Mass. at 599; *Tosti v. Ayik*, 394 Mass. at 492.

Bildman has not identified specific evidence in the summary judgment record which raises a dispute as to whether Astra subjectively knew of the falsity or seriously doubted the truth of its statement that he put himself above the rules and tried to cover up his actions. Similarly, Bildman has failed to identify facts in the record to show that Astra subjectively knew of the falsity or recklessly disregarded the truth of its statement that management, through its preliminary investigation, was practically certain that something serious had happened. Although there is a dispute as to the truth of the statements, mere falsity is not enough to establish malice. *Roketenetz v. Woburn Daily Travel, Inc.*, 1 Mass. App. Ct. 156, 161 (1973); *Bose Corp. v. Consumers Union of U.S., Inc.*, 84 F.R.D. 682, 685 (D. Mass. 1980). Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims based on Mogren's May 13 address.

5. May 3, 1996 Wail Street Journal Article

On May 3, 1996, the *Wall Street Journal* published an article entitled "Astra USA Investigates Alleged Misuse of its Funds by Suspended CEO, Others" which stated in relevant part: "[Astra spokesman] Mr. Kincannon said that Astra AB officials grew concerned when Mr. Bildman was not forthcoming' to them in handling inquiries from *Business Week* magazine about possible sexual harassment at Astra USA. 'He assured them that nothing was wrong,' Mr. Kincannon said."

Again, Astra argues that this statement is non-defamatory opinion and that it is privileged. The statement that Bildman was not forthcoming can

reasonably be viewed as a factual assertion that he was deceitful and had something to hide. Also, to the extent that this statement is interpreted as Astra's opinion, it implies that the company has undisclosed defamatory facts to support it. Although Astra contends that this statement is true, the summary judgment record reveals a dispute as to whether or not Bildman kept Astra informed during the investigation.

Although Astra claims it was conditionally privileged to make its statement, the privilege is one of publication to a narrow class of people who share a legitimate interest in the publication. See *Draghetti v. Chmielewski*, 416 Mass. at 813-814. It is debatable whether publication of this information to the media was reasonably necessary to protect or further Astra's legitimate business interest or whether the public has a common interest with Astra in the subject which was furthered. See *Id.* (no privilege for police chief to publish to news reporter statements concerning evidence of wrongdoing in investigation of officer).[10] Assuming that Astra was privileged, as discussed above, there would be an issue of fact with respect to whether Astra acted with malice toward Bildman so as to deprive it of any conditional privilege.

However, insofar as Bildman is a public figure, he must show actual malice in the constitutional sense

---

[10] Astra cites numerous cases from other jurisdictions which have held that a company's publication to the media of information concerning wrongdoing by an employee is within the conditional privilege. See, e.g., *Richmond v. South Wire Co.*, 980 F.2d 518 (8th Cir. 1992); *Straitwell v. National Steel Corp.*, 869 F.2d 248 (4th Cir. 1989); *Gallo v. Princeton Univ.*, 656 A.2d 1267 (NJ. App. Div.), rev. den., 663 A.2d 1359 (N.J. 1995).

which is not merely ill will or ulterior motive, but knowledge of falsity or reckless disregard of truth. See *Rotkiewicz v. Sadowsky*, 431 Mass. at 755; *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. at 16. Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or had serious doubt about the truth of the statement that Bildman was not forthcoming in the investigation. He has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is therefore entitled to summary judgment on the defamation claims insofar as based on the May 3 Wall Street Journal article.

6. May 13 Business Week Article

On May 13, *Business Week* published an article by Maremont entitled "Abuse of Power: the astonishing tale of sexual harassment at Astra's U.S. pharmaceutical subsidiary" which contained the following statements, among others:

> On April 29 as *Business Week* was about to publish the results of a six-month investigation into allegations of rampant sexual harassment at Astra, Bildman was suspended and relieved of his responsibilities by Astra's parent, giant Swedish drug-maker Astra AB. . . .
>
> Senior Astra executives acknowledged that *Business Week*'s investigation sparked the abrupt action. Although Bildman had told superiors about the investigation months ago, Carl-Gustaf Johansson, a member of Swedish Astra's executive committee, says the company was unaware of the full scope of the allegations until it

> received a lengthy letter from *Business Week* on April 19. "We hadn't heard anything this detailed—and certainly not that Mr. Bildman himself was the focus" of some allegations, says Johansson. Refusing further comment on Astra's own preliminary inquiries—which also now include allegations of minor financial improprieties by Bildman—Johansson says Astra suspended its U.S. CEO because "we lost some trust in him."

Astra contends that these statements are non-defamatory, true and privileged. Assuming that the first statement is susceptible of a defamatory meaning, it is true and therefore cannot be the basis of a libel claim. Because Bildman has no reasonable expectation of demonstrating that the statement that Astra "lost trust in him" is false, he cannot base a claim of libel thereon.

The statements that the company was unaware of the extent of the allegations and Bildman's involvement are susceptible of a defamatory meaning in that they imply that Bildman misled the company. Although Astra contends that these statements are true, there is a factual dispute concerning exactly when Astra knew of Bildman's involvement.

Again, although there is an issue of fact with respect to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege, Bildman must meet the higher standard applicable to a public figure. Bildman has not identified specific evidence in the summary judgment record which raises a dispute as to whether Astra subjectively knew of the falsity or seriously doubted the truth of its statement it was unaware of the scope of the allegations until April 19. Although there is a dispute as to the truth of the statements, mere falsity

is not enough to establish malice. *Roketenetz v. Woburn Daily Travel. Inc.*, 1 Mass. App. Ct. at 161; *Bose Corp. v. Consumers Union of U.S., Inc.*, 84 F.R.D. at 685. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is therefore entitled to summary judgment on the defamation claims insofar as based on the May 13 *Business Week* article.

7. May 24 Boston Globe Article & May 24 Boston Herald Article

On May 24, 1996, the *Boston Globe* published an article entitled "Astra AB's chief says Bildman won't be back," which stated in relevant part:

> Astra AB Chief Executive Håkan Mogren said Lars Bildman, the suspended chief executive of the company's scandal-plagued U.S. unit in Westboro, will not return to the position he had occupied for the past 15 years.
>
> "It would be impossible to have him back in that job. How could people work together and create a good atmosphere?," Mogren said in New York.

Also on May 24, the *Boston Herald* published an article entitled "Suspended Astra Exec Won't Return," which contained identical statements.

The statement that Bildman would not be returning as CEO is a true, non-defamatory describing action taken by Astra. The mere announcement of an employee's termination is not itself defamatory regardless of any inferences which others may draw as a result. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724. Further, Mogren's statement

that it would be impossible for Bildman to return is so subjective and incapable of being proved true or false that it can only reasonably be viewed as his opinion. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the May 24 *Boston Globe* and *Boston Herald* articles.

8. May 1996 CBS Appearance

In May of 1996, Kincannon appeared on a CBS News "Eye on the Nation" segment concerning the allegations of sexual harassment at Astra U.S.A. When asked whether Bildman would return to Astra U.S.A., Kincannon replied that he would not. Kincannon based this response on newspaper reports that according to Mogren, Bildman would not be returning. Kincannon's statement that Bildman would not be returning was a true statement of fact which cannot be the basis of a libel claim. Astra is therefore entitled to summary judgment on the defamation claims insofar as they are based on Kincannon's May 1996 CBS Appearance.

9. February 4, 1998 Settlement Announcement & February 5 Press Release

On February 4, 1998 Ivan Rowley, President of Astra U.S.A., announced a settlement with the E.E.O.C. of sexual harassment charges against the company, stating in relevant part:

> In May, 1996, the Equal Employment Opportunity Commission initiated its investigation into allegations of sexual harassment at Astra USA. Before that, Astra had begun its own internal investigation and had suspended the CEO and two other senior executives. Astra took these actions immediately after learning of the allegations.

> Astra's cooperation with the EEOC investigation was a natural extension of Astra's own investigation and other steps already taken by the company. Our cooperation was based on a common desire with the EEOC to get at the truth and rectify what ever damage had been done to current and former Astra employees.

On February 5, 1998, Astra U.S.A. issued a press release containing identical statements.

Whether a statement is reasonably susceptible of a defamatory meaning is a threshold question of law. *Foley v. Lowell Sun Publ'g Co.*, 404 Mass. at 11. The statements in the settlement announcement identified by Bildman cannot reasonably be viewed as discrediting him in the minds of any considerable and respectable class of the community. Further, the statements are either true or incapable of being proved false. Astra is entitled to summary judgment on the defamation claims insofar as they are based on the February 4 Settlement Announcement and February 5 press release.

10. February 5 Middlesex News Article

The *Middlesex News* published an article on February 5 entitled "Astra Settles Federal Harassment Suit: Record Setting Deal Ends EEOC Probe" which reported Astra's filing of a lawsuit against Bildman and stated, "Kincannon said that the rest of the damages would cover legal costs, including the cost of an internal investigation in early 1996. Astra's lawsuit also demands that Bildman repay the company for any fines and settlements from the EEOC investigation."

These statements are true statements of fact which simply describe what Astra seeks to recover as dam-

ages in its lawsuit. They are not reasonably susceptible of a defamatory meaning. Astra is entitled to summary judgment on defamation claims insofar as they are based on the February 5 *Middlesex News* Article.

11. February 5 Boston Globe Article

Also on February 5, the *Boston Globe* published an article entitled "$10M Astra Settlement is Expected," which stated in relevant part:

> A federal agency is expected today to announce that Astra USA Inc. agreed to pay $10 million to settle allegations of sexual harassment and attempts to cover it up during the scandalous tenure of ousted chief executive Lars Bildman. . . .
>
> Astra USA said it wants "any amounts paid as a result of the investigation" by EEOC.
>
> Sources familiar with the negotiations put the settlement at $10 million. . . .
>
> "His actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company," Astra USA's spokesman, Benjamin Kincannon, said yesterday.

The first statement identified by Bildman does not appear to be attributable to Astra. In any event, it is a true non-defamatory statement. Cf. *Perry v. E. Anthony & Sons, Inc.*, 353 Mass. 112, 114 (1967) (accurate report that plaintiff had settled her lawsuit for $1 not capable of defamatory meaning, even if she claimed it implied suit lacked merit). The second statement is a true statement describing what Astra seeks to recover as damages in its lawsuit and is not reasonably susceptible of a defamatory meaning. The

third statement, to the extent it can be attributed to Astra, is a true non-defamatory statement.

The statement that Bildman destroyed records in an attempt to cover up his actions is susceptible of a defamatory meaning. Although Astra claims truth as a defense, the summary judgment record reveals a factual dispute as to whether Bildman destroyed records and engaged in a cover up. Assuming this statement was conditionally privileged as necessary to protect a legitimate business interest, an issue of fact exists as to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege

However, insofar as Bildman is a public figure, he must show actual malice in the constitutional sense which is not merely ill will or ulterior motive, but knowledge of falsity or reckless disregard of truth. See *Rotkiewicz v. Sadowsky*, 431 Mass. at 755; *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. at 16. Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or recklessly disregarded the truth of the statement that Bildman destroyed records in an attempt to cover up his wrongdoing. Administrative Assistant Lucy Tapper told investigators that in April of 1996, during the investigation and before Badman's suspension, Bildman asked her to come into the office on a Sunday to look for files relating to AMI and personal files that would help him with his taxes, such as expense documents relating to his house. While she was there, she observed that Bildman spent the entire day shredding documents and loading files into the trunk of his car. (Ex. H to Carling Aff. pp. 22-28). Tapper did not know the

content of the shredded documents or removed files. (Ex. H. to Carling Aff. p. 26). Karen Hanna told investigators that in the beginning of April, Bildman asked her to remove from his office binders containing his expense account reports and register. (Ex. B to Carling Aff. pp. 2-7). The following week, when Hanna was looking for the AMI files, she could not find them and Bildman told her that he and Lars Magnusson had removed them. (Ex. B to Carling Aff p. 9).

Paralegal Mary Natale told investigators that on April 10 a computer person named Roger came to the offsite office and was instructed to take everything off the C drive of the computers. (Ex. F to Carling Aff. p. 20). Roger Legendre, head of Astra's information technology unit, was asked by Magnusson to erase the computer drives at the off-site office. (Legendre Dep., p. 65). He found no files on the computers and so did not erase anything. (Legendre Dep., pp. 66-67). On April 23, Bildman called Magnusson in the off-site office, after which Magnusson told Natale and two other employees to pack up everything in the office including records, documents and computer disks and anything bearing the Astra name. (Ex. F. to Carling Aff. pp. 13-16). The items were packed into boxes and placed in Magnusson's car. (Ex. F. to Carling Aff. p. 17).

There is no evidence that the testimony of these employees was obviously unreliable and the evidence as a whole does not allow an inference that Astra should have had serious doubt as to the truth of its conclusion that Bildman was covering up his actions. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is entitled to summary judgment on the

defamation claims insofar as they are based on the February 5 *Boston Globe* Article.

12. February 6 Boston Herald Article

On February 6, 1998, the *Boston Herald* published an article entitled "Astra-Nomical: firm settles sex harass claims for $9.85 Million," which also referred to Astra's civil suit stating, "Astra admitted the suit is partly an effort to stick the former CEO with the bill for EEOC settlement." This statement is not reasonably susceptible of a defamatory meaning; indeed, insofar as it uses the word "stick" it suggests Astra is doing something negative. Astra is therefore entitled to summary judgment on the defamation claims insofar as they are based on the February 6 *Boston Herald* article.

13. June 26, 1996 News Release & Press Release

On June 26, 1996, Astra AB issued a news release which stated in relevant part:

> Astra USA today announced the termination of Lars 'Wotan, the former President and CEO of the company. Bildman had been suspended on April 28, 1996 pending the results of an investigation into improprieties within the company that occurred during his tenure as CEO. . . .
>
> Bildman's termination was announced at a press conference at which Astra officials commented on the investigation by the company into allegations of sexual harassment, financial improprieties, and other activities considered inappropriate by the company.
>
> "Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra," said Executive Vice President C.G.

> Johansson of Astra AB, who headed the investigating committee established by the Board of Astra USA. . . .
>
> Bildman chose not to cooperate with the investigation.
>
> The investigation showed evidence of a variety of improper activities, including misuse of company funds, inappropriate behavior at company functions, disregard of established company rules and procedures, and a neglect by Mr. Bildman to keep the parent company informed of these problems at its subsidiary.
>
> There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .
>
> According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.
>
> Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company. . . .

Astra also issued a press release on June 26 containing identical statements.

The first two statements identified by Bildman are true, non-defamatory statements describing action taken by Astra. The mere announcement of an employee's termination is not itself defamatory regardless of any inferences which others may draw

as a result. See *Goldhor v. Hampshire Coll.*, 25 Mass. App. Ct. at 724. The statement that Bildman did not cooperate with the investigation is substantially true in that he refused to directly answer any questions posed to him by the investigators and thus cannot form the basis of a defamation claim.

Astra contends that the remaining statements are non-defamatory and true because they are qualified by terms such as "the investigation showed" or "there was evidence that." However, Astra is not necessarily immunized from liability by use of such qualifiers where there are factual disputes as to whether Bildman committed the wrongdoing the investigation purportedly uncovered and Astra's statements may in fact have given the public a false impression of the strength of the evidence uncovered. There are factual disputes in the record with respect to whether Bildman's use of company funds for home renovations and vacations was in fact improper, whether he adequately reported his activities to the company, whether he fabricated a conspiracy scheme to deflect attention from his activities and whether he used an offsite office to cover up his activities. Therefore, this Court cannot say as a matter of law that the statements are non-defamatory or substantially true.

Again, although there is an issue of fact with respect to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege, Bildman must meet the higher standard applicable to a public figure: knowledge of falsity or serious doubt as to the truth of the statements. Bildman has not identified any evidence in the summary judgment record suggesting that Astra knew that its statements concerning his use of company funds, inappropriate behavior, disregard of

rules and reporting of his activities to the company were false or that it had serious doubts about the truth of such statements. Although the record appears to reveal factual disputes as to whether Bildman did in fact commit such wrongdoing, falsity of statements alone is not enough to show malice. See *Roketenetz v. Woburn Daily Travel, Inc.*, 1 Mass. App. Ct. at 161.

With respect to the statement that no evidence supported Bildman's "enemies of the company" theory, Bildman points to the following to support his contention that Astra knew that a competing pharmaceutical company, Astra-Merck, Inc. (AMI), might be behind the *Business Week* article. In January of 1996, the task force headed by Bildnian gave Mogren a "Situation Analysis" memorandum stating that they were trying to determine whether the lead for the *Business Week* story was provided by competitor AMI and detailing possible connections between AMI's President and individuals at *Business Week*. (Ex. 5 to Joy Dep. in Bildman Supp.) In April of 1996, Leonard DeCof, a member of Bildman's task force, met in Sweden with Mogren and Johannson. (DeCof Dep., p. 76). DeCof told Mogren that Astra investigator Nezer had information that AMI had hired Kroll Associates to do a massive investigation of Astra and that it might be a routine investigation by a competitor in preparation for merger negotiations or it might be for the purpose of tarnishing the company with the *Business Week* article to "soften" Astra for a takeover. (DeCof Dep., pp. 83-84). Mogren said that he did not think there was a real threat from Merck and Bildman was paranoid. (DeCof Dep., p. 84; Exhibits to DeCof Dep.).

Astra attorneys Yon and Culbert, both members of the task force, did not believe AMI was behind the *Business Week* story and told Bildman so. (Yon Dep., p. 44). DeCof, who was involved in investigating the AMI theory, ultimately concluded and told Mogren that *Business Week* reporter Maremont was honest and just looking for a story. (DeCof Dep., pp. 54-55). According to DeCof, he did not form the conclusion that AMI's President had any special relationship with *Business Week*. (DeCof Dep., p. 57).

That Mogren and Astra knew that the AMI theory was being actively investigated but did not credit it does not establish that the statements, "According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this." were knowingly false or that Astra seriously doubted their truth. The summary judgment record suggests that Bildman was the first one to raise this theory and that he directed others on the task force to pursue it aggressively. Bildman has not pointed to any evidence that AMI was in fact behind the *Business Week* article; rather, he argues that Astra's statement unnecessarily implies that his advocacy of the theory was deceptive. This Court concludes that Bildman has no reasonable expectation of establishing malice with respect to the "enemies of the company" statement.

With respect to the statement concerning Bildman's use of the offsite facility, Bildman points to Yon's testimony that he told investigators that it was set up at DeCof's request so he could have space to keep files and so that Lars Magnusson could have additional work space. (Yon Dep., pp. 128-129).

However, Astra had evidence that following a call from Bildman to Magnusson during the investigation, the offsite facility was cleaned out, documents were removed and computer hard drives erased. (Clauss Dep., p. 34). That Astra may have known that it was not originally Bildman's idea to rent the offsite space is not enough to establish by clear and convincing evidence that its statement "Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company?' was made with knowledge of falsity or serious doubt as to truth. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the June 26 news release.

14. June 26 Press Conference

At a press conference on June 26, Johansson stated in relevant part:

> In December, Mr. Bildman informed me that a journalist was making inquiries about Astra USA that included questions about alleged sexual harassment at the company. Mr. Bildman assured me that there was nothing to worry about. He also did not mention that he himself was a focal point of the inquiries.
>
> Mr. Bildman was asked on a number of occasions after that whether any of the allegations involved him. He was also asked whether Astra USA had anything to be ashamed of. He said no.

On April 19, we received in Sweden a letter from *Business Week*. . . . We were shocked by what we read.

Mr. Bildman refused to cooperate with the investigation. . . .

Mr. Bildman was terminated because he violated the trust that had been placed in him by the Astra Group. His style of leadership was unacceptable. And certain of his actions were unprofessional and hurtful to the morale of the employees.

Our investigation also found that Mr. Bildman exhibited inappropriate behavior at company functions, primarily internal sales meetings held off company premises.

There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .

Our investigation also showed that Mr. Bildman went to great lengths to keep his behavior secret from his superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company.

According to our investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.

In all of these activities, Mr. Bildman displayed a disregard for both established rules and procedures of the Astra Group and for the high ethical principles that are implicit in our corporate culture. . . .

> Because of the unprofessional actions of one person in one of our 45 subsidiaries, the Astra name has become associated with activities that are the complete opposite of the high ethical and moral principles for which we have been known for over eight decades. . . .
>
> But there is no doubt that Lars Bildman abused his power as President of Astra U.S.A. Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra. . . .
>
> This is the end of an unfortunate and distasteful chapter in the history of Astra U.S.A.

Contrary to Astra's assertions, these statements are reasonably susceptible of a defamatory meaning. The final statement is clearly one of opinion, since the terms "unfortunate" and "distasteful" are imprecise and open to numerous interpretations, and would be difficult to prove true or false. However, the remainder of the statements at issue are reasonably interpreted as assertions of fact. Again, the summary judgment record reveals factual disputes with respect to whether the statements are substantially true.

Except for the statements concerning enemies of the company and use of the offsite office, which are discussed above, Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or had serious doubt about the truth of these statements. He has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the June 26 press conference.

Finally, Bildman contends that summary judgment must be denied under a theory of "defamation by conduct." He argues that Astra's suspension of him just before the *Business Week* article was published is defamatory. Several jurisdictions have recognized that conduct may be actionable as defamatory where it rises to the level of "dramatic pantomime"—an interplay of conduct and words that provides a clearly discernible account of a false statement about the plaintiff. See *Bolton v. Department of Human Serv.*, 540 N.W. 2d 523, 525 (Minn. 1995) (declining to recognize such a cause of action but noting that Alaska, North Dakota, Pennsylvania and Wisconsin allow defamation by conduct). The only case cited by Bildman in support of his assertion that Massachusetts recognizes defamation by conduct is *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 (D. Mass. 1996) (denying summary judgment on employee's claim that she was defamed when after terminating her, employer escorted her from building while speaking to her in a loud, demeaning voice). I decline to recognize a theory of defamation by conduct here. The fact that Astra suspended Bildman right before the release of the *Business Week* article adds nothing to his defamation claim. For all the reasons discussed above, Astra is entitled to summary judgment on Counts IV and VII of Bildman's counterclaim.

IV. Individual Defendants' Motion for Summary Judgment on Bildman's Complaint in Action No. 99-1942

A. Intentional Interference with Contract

Count I of Bildman's complaint alleges that Mogren and Johansson intentionally interfered with his contract of employment with Astra U.S.A. by voting to suspend him and ultimately to terminate his

position as CEO and President. The defendants move for summary judgment on the ground that Bildman has no reasonable expectation of establishing such a claim at trial. A plaintiff alleging interference with contract must demonstrate that he had a contract with a third party; the defendants intentionally and knowingly induced the third party to break that contract; the defendants' interference was improper in means or motive, and the plaintiff was harmed by the defendants' actions. *Harrison v. NetCentric Corp.*, 433 Mass. 465, 476 (2001); *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 476 (1992). Where a plaintiff alleges intentional interference with his employment by an individual officer of the employer acting within his supervisory responsibilities, the plaintiff must demonstrate that the official acted with actual malice: a spiteful, malignant purpose unrelated to the legitimate corporate interest. *Weber v. Community Teamwork, Inc.*, 434 Mass. 761, 781-782 (2001); *Shea v. Emmanuel College*, 425 Mass. 761, 764 (1997); *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. at 476. The plaintiff must show facts giving rise to a rational inference of probability that spite or ill will was the controlling factor in the alleged interference. *Weber v. Community Teamwork, Inc*, 434 Mass. at 781; *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 663 (1981); *Alba v. Sampson*, 44 Mass. App. Ct. 311, 315, *rev. den.*, 427 Mass. 1104 (1998).

Bildman contends that he is not required to show that Mogren and Johansson acted with actual malice because they were not acting in the scope of their employment as corporate officials when they voted to suspend and later terminate him. To support this proposition, Bildman points to evidence that Mogren and Johansson had begun investigating the allegations of sexual harassment against him before the

April 28, 1996 Board meeting at which he was suspended. The fact that Mogren and Johansson were involved in a preliminary investigation two weeks before the Board formally established an investigative committee does not demonstrate that their votes to suspend and ultimately terminate Bildman's employment occurred outside the course of their corporate duties as directors. Bildman therefore must demonstrate actual malice in order to prevail on his interference with contract claims.

As evidence of malice, Bildman contends that Johansson lacked sufficient evidence of wrongdoing to justify his vote in favor of suspension. For example, Johansson relied on Ianelli's suggestion that Bildman had committed financial improprieties although Ianelli never provided any specifics. (Johansson Dep., pp. 627-632). A showing only of negligent investigation or sloppy decision making is insufficient to establish malice. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. at 665; *Mathias v. Beatrice Foods*, 23 Mass. App. Ct. 915, 917 (1986).

However, the record also reveals evidence of personal animus between Johansson and Bildman. Astra is correct that an inference that Johansson did not like Bildman, without more, would not warrant the inference that he acted with ill will in seeking Bildman's suspension and termination. See *Alba v. Sampson*, 44 Mass. App. Ct. at 316. Nonetheless, the record reveals that Johansson and Bildman's relationship was severely strained with deep disagreements over both the general direction and daily functioning of Astra U.S.A. In addition, there is evidence that Bildman was instrumental in bringing about the defeat of Johansson's marketing proposal for the Pulmicort Turbuhaler and that on at least one

occasion the two men screamed at each other and nearly came to blows over their differences. This evidence coupled with the fact that Johansson was the chairman of the investigating committee is sufficient evidence from which a jury could conclude that Johansson's votes to suspend and terminate Bildman were based on retaliation or ill will rather than the good of the corporation. See *Draghetti v. Chmielewski*, 416 Mass. at 817 (strained relations between employee and supervisor almost resulting in physical confrontation sufficient evidence to support inference of improper motive); *McNamee v. Jenkins*, 52 Mass. App. Ct. 503, 509 (2001) (evidence that employee harbored resentment toward supervisor because of negative performance evaluations sufficient evidence of improper motive).

Bildman also points to evidence in the record raising an issue of fact with respect to whether the General Conditions applied to CEOs of Astra subsidiaries, and argues that although Johansson knew they did not apply to Bildman he failed to so inform the rest of the Board. (Lasagna Dep., pp. 45-48). Further, although Tully and Joy told Johansson that they had previously investigated several sexual harassment claims against Bildman and found the claims to be without merit, Johansson did not disclose this to the rest of the Directors at the time of the vote to suspend Bildman. This evidence supports an inference that Johansson was more concerned with obtaining Bildman's suspension that with the fairness of the process or accuracy of the result. Accordingly, Johansson is not entitled to summary judgment on Count I of the complaint.

Bildman cites the following facts to establish that Mogren acted for a spiteful, malignant purpose

unrelated to Astra's legitimate corporate interest. First, in his deposition, Mogren could not remember what specific evidence he had seen from either the preliminary investigation or the committee's presentation to the Board to support the allegations of wrongdoing against Bildman. (Mogren Dep. Vol. IV, pp. 279-286). Mogren's failure to recall does not establish that his decision at the time was not based on evidence which was presented to him. Bildman also notes that Mogren relied on Ianelli's statement that he could believe the sexual harassment allegations against Bildman although Ianelli never actually told Mogren that he had seen any misconduct. (Ianelli Dep., pp. 182-193). Again, mere negligence or sloppy decision making is insufficient to establish malice. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. at 665; *Mathias v. Beatrice Foods Co.*, 23 Mass. App. Ct. at 917.

However, Bildman also points to evidence which suggests that Mogren was not interested in a fair appraisal of the allegations against him but rather wanted to accomplish a predetermined result. For example, there is a factual dispute in the record with respect to whether the General Conditions applied to CEOs of Astra subsidiaries and whether although Mogren knew they did not apply to Bildman, he failed to so inform the rest of the Board. Similarly, Mogren failed to tell the Board that he had authorized certain landscaping costs, which was important information the outside directors should have had before voting. (Lasagna Dep., pp. 45-48). Further, in September of 1995, Johansson told Bildman that Mogren was angry with Bildman for answering questions about Astra U.S.A. during a visit from Astra AB board members, undermining Mogren's authority with the board and top management. (2/18/00

Bildman Aff. ¶ 17). Other top executives told Bildman that because Mogren was angry with him, it was only a matter of time before he would be forced out of Astra U.S.A. (2/18/00 Bildman Aff. ¶ 18). This evidence coupled with the underlying dispute in the record as to whether the investigation was fair and objective is sufficient evidence from which a jury could conclude that Mogren's votes to suspend and terminate Bildman were based on retaliation or ill will rather than the good of the corporation. See *Draghetti v. Chmielewski*, 416 Mass. at 817; *McNamee v. Jenkins*, 52 Mass. App. Ct. at 509. Accordingly, Mogren is not entitled to summary judgment on Count I of the complaint.

B. Intentional Infliction of Emotional Distress

Count II of Bildman's complaint alleges that Mogren and Johansson are liable for intentional infliction of emotional distress for their conduct in investigating him and terminating his employment. Astra first moves for summary judgment on the ground that such a claim is barred by the exclusivity provision of the Workers' Compensation Act, G.L. c. 152, § 24, which precludes common law actions where the plaintiff is an employee; his condition is a compensable personal injury within the meaning of the Act, and the injury arose out of and in the course of his employment. *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 558 (1996); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. 212, 215 (1998). The requirement that the injury arise out of the employment is broadly construed and is satisfied if the injury arises out of the nature, conditions, obligations or incidents of the employment: in other words, the employment looked at in any of its aspects. *Doe v. Purity Supreme,*

*Inc.*, 422 Mass. 563, 566 (1996); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 215.

Here, Bildman alleges that he suffered emotional distress as a result of the defendants' investigation of his activities and suspension and then termination of his employment. Intentionally inflicted emotional distress is a compensable injury under the Workers' Compensation Act. See G.L. c. 152, § I(7A); *Green v. Wyman-Gordon Co.*, 422 Mass. at 558; *Foley v. Polaroid Corp.*, 381 Mass. 545, 550 (1980); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 215. Further, the distress suffered by Bildman as a result of the investigation and his termination clearly arose out of his employment as President and CEO of Astra U.S.A. See *Mullen v. Ludlow Hosp. Soc'y*, 32 Mass. App. Ct. 968, 970, *rev. den.*, 413 Mass. 1102 (1992) (emotional distress caused by employee's discharge compensable under G.L. c. 152).

A claim against a fellow employee for commission of an intentional tort is barred by G.L. c. 152, § 24 if committed within the course of the co-worker's employment and in furtherance of the employer's interests. *Doe v. Purity Supreme, Inc.*, 422 Mass. at 565; *Anzalone v. MBTA*, 403 Mass. 119, 124 (1988); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 216).[11] Although an employee may have more

---

[11] There is no support for Bildman's assertion that a corporate director cannot be an employee under the Workers' Compensation Act. The Act defmes "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written" and then enumerates various exceptions. Corporate directors are not expressly excepted from the definition. See G.L. c. 152, § I. See also *Emery's Case*, 271 Mass. 46, 48 (1930) (corporate officer and shareholder can be "employee" under c. 152). Cf. *Ryder's Case*, 341 Mass. 661, 664-665 (1961)

than one motive for performing an act, he is acting in the scope of his employment as long as one significant purpose is related to the employment. *Mendes v. Ng*, 400 Mass. 131, 134-135 (1987). Here, although there is a factual dispute with respect to whether Mogren and Johansson may have been motivated in part by ill will, it is nonetheless clear that their actions in investigating Bildman's alleged misconduct as President and CEO and voting to terminate him were activities within the scope of their duties as Directors of Astra U.S.A. and related to Astra's legitimate interests. Cf. *O'Connell v. Chasdi*, 400 Mass. 686, 690 (1987) (workers' compensation act did not bar intentional infliction of emotional distress claim arising from supervisor's sexual harassment of employee because harassment was in no way related to employer's interests).

Mogren's and Johansson's conduct therefore arose in the course of their employment by Astra and they are immune from tort liability under G.L. c. 152, § 24. See *Anzalone v. META*, 403 Mass. at 122-125 (workers' compensation act bars intentional infliction of emotional distress claim based on supervisor's criticism of plaintiff's performance, assignment of demeaning tasks, violation of light duty order and purposely exacerbating plaintiff's medical condition); *Foley v. Polaroid Corp.*, 381 Mass. at 550 (workers' compensation act bars intentional infliction of emotional distress claim based on investigation of rape allegation against employee, suspension of his position, instigation of criminal charges against him and hostile treatment following his acquittal); *Fusaro v. Blakely*, 40 Mass. App. Ct. 120, 124 (1996) (workers'

---

(partner is not an "employee" under c. 152 because partnership is not separate legal entity from partners comprising it).

compensation act bars intentional infliction of emotional distress claim against pharmacy security officers who during drug investigation at pharmacy threatened and intimidated employee and attempted to coerce a confession). Accordingly, the individual defendants are entitled to judgment as a matter of law on Count I of the complaint.

Even if Bildman's claim was not barred by the exclusivity provision of the workers' compensation act, he has no reasonable likelihood of establishing such a claim at trial. To prevail on a claim of intentional infliction of emotional distress, the plaintiff must establish that the defendant intended to inflict emotional distress or knew or should have known that such distress was the likely result of his conduct, that the conduct was extreme and outrageous beyond all possible bounds of decency and utterly intolerable in a civilized society, and that the defendant's conduct caused the plaintiff to suffer severe emotional distress of such a nature that no reasonable person could be expected to endure it. *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 466 (1997); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145 (1976); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 218. The mere fact that a defendant acted with tortious intent and that his conduct was characterized by "malice" is not a sufficient predicate for liability for intentional infliction of emotional distress. *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. at 466; *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987).

Viewed in the light most favorable to Bildman, the summary judgment record suggests that Mogren and Johansson, motivated by toward him, voted to terminate his employment following a biased investigation

of allegations raised by others of financial and sexual improprieties. This conduct, although perhaps tortious and in breach of Bildman's employment contract, does not rise to the level of extreme and outrageous conduct beyond all possible bounds of decency and utterly intolerable in a civilized society. See *Foley v. Polaroid Corp.*, 400 Mass. at 100 (employer's conduct in investigating rape allegation against employee, instigating criminal charges against him and treating him hostilely following his acquittal not extreme and outrageous); *Chakrabarti v. Cohen*, 31 F.3d 1, 6 (1st Cir. 1994) (supervisor's conduct in intentionally interfering with staff psychiatrist's employment by misstating facts about his competence, placing him in dead-end job and making procedural missteps in deciding not to renew his clinical privileges not extreme and outrageous as matter of law). Cf. *Bowman v. Heller*, 420 Mass. 517, 520 (1995), *cert. den.*, 516 U.S. 1032 (1996) (jury could find extreme and outrageous employee's conduct of circulating in workplace pornographic pictures superimposed with the face of co-employee who was rival in union election); *Agis v. Howard Johnson Co.*, 371 Mass. at 141, 145 (jury could find extreme and outrageous employer's conduct in firing employees in alphabetical order until someone confessed to workplace theft); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 219 (jury could find extreme and outrageous employer's conduct in compelling secretary through tears and threats of suicide to commit forgery for his personal benefit); *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1050 (D. Mass. 1995) (jury could find extreme and outrageous vice-president's conduct in sexually harassing employee and retaliating against her after she filed a grievance).

Bildman contends that in terminating him, the defendants "vilified him" and "took steps to maximize [his] shame in the eyes of co-workers." See *Conway v. Smerling*, 37 Mass. App. Ct. 1, 9(1994). However, as discussed above, the overwhelming majority of the public statements made by the defendants in connection with the investigation and termination were privileged. Accordingly, this Court concludes that Bildman has no reasonable expectation of establishing intentional infliction of emotional distress at trial. Thus the individual defendants are entitled to judgment as a matter of law on Count II of the complaint.

V. Bildman's Motion for Partial Summary Judgment on Counts I, III and V of Astra's Complaint

Finally, Bildman moves for partial summary judgment on Count I of Astra's complaint alleging fraud, Count III alleging waste of corporate assets and Count V alleging conversion insofar as these counts are premised on expenses associated with marketing and sales conferences at the New Seabury Resort and Conference Center in Cape Cod from 1993 to 1995, expenses associated with yacht trips in connection with marketing and sales conferences in Florida from 1992 through 1995, personal vacations and meals at restaurants, use of a travel agency to overcharge Astra for personal expenses and use of German contractors to charge Astra for work done on Badman's homes. Bildman contends that the summary judgment record demonstrates as a matter of law that he did not commit any wrongdoing in connection with these particular allegations.

Bildman first contends that there is no genuine issue of material fact with respect to the propriety of the 1993, 1994 and 1995 New Seabury management

conferences. 11e points to evidence in the summary judgment record that as President and CEO of Astra U.S.A., he had authority to incur travel and entertainment expenses within his sole discretion as long as they were within budget and promoted some business purpose. See, e.g., 7/30/01 Bildman Affidavit ¶ 9; Sjostrand Affidavit ¶¶ 6-8; Broere Affidavit ¶ 9. There is also evidence that the New Seabury management conferences served a legitimate business purpose, that Astra business was discussed there and that the participation of wives and children at the conferences promoted Astra's business interests. See, e.g., 5/11/98 Bildman Affidavit ¶¶ 5-6; 6/30/01 Bildman Affidavit ¶¶ 1-5; Wadsworth Deposition, pp. 3-6; Miller Deposition, p. 82; 7/25/01 Testen Affidavit ¶¶ 4-6.

However, Astra has produced evidence that the New Seabury trips violated the Employee Expense Policy, lacked the normal indicia of business trips such as reserved conference rooms, rented audiovisual equipment and business agendas and were essentially personal vacations in which little or no business was discussed. See, e.g., Ex. 31 to Bildman Deposition; Yon Deposition, p. 149; 4/15101 Testen Affidavit ¶¶ 7-9; Boudreau Dep., pp. 62-63; Miller Deposition, pp. 68-70. There is also evidence that Shirley Miller, who organized the conferences, was told by Solvell not to discuss the details of the conferences with anyone and to send accounts payable an invoice stating only the total charge for the conferences, but not any supporting documentation. Miller Deposition, pp. 72-74. Accordingly, there is a factual dispute with respect to the propriety of the New Seabury conferences and Bildman is not entitled to judgment as a matter of law.

Bildman next contends that there is no genuine issue of material fact with respect to the propriety of the yacht trips taken during Florida marketing conferences, pointing to evidence in the record that the yacht trips were planned to entertain Astra AB executives and that while on such trips, the participants discussed Astra business, including the launch of the Pulmicort Turbuhaler. See, e.g., 6/30/01 Badman Affidavit ¶¶ 6-7. There is also evidence in the record that the hiring of female "escorts" to entertain Astra visiting executives was a common practice. See e.g., Aarons Deposition, pp. 541-558. However, Astra has proffered evidence to the contrary that the yacht trips and hiring of "escorts" violated the Employee Expense Policy, that the expense reports for these activities were altered to disguise the nature of the activities and that these activities were undertaken for personal pleasure. See, e.g., Ex. 31 to Bildman Deposition; Yon Deposition, p. 149; Aarons Grand Jury Transcript, pp. 13-16, 21-23; Solvell Grand Jury Transcript, pp. 8-15. Bildman therefore is not entitled to judgment as a matter of law with respect to these activities.

Bildman next contends that Astra has no evidence to support its allegations of wrongdoing in connection with restaurant arrangements in New Seabury and travel arrangements made through CareFree Travel. He points to evidence in the record that he never instructed restaurant owners at Regatta Falmouth or Regatta Cotuit to overcharge or overbill Astra to create excess balances to be used for personal dinners or parties for him. See 6/20/01 Bildman Affidavit ¶¶ 10. However, Astra has introduced evidence that at Bildman's request, arrangements were made at these two restaurants to have all meals by him and his family charged to Astra's account. See Ex. 40

to Miller Deposition; Miller Deposition, pp. 63. As discussed above, there is a factual dispute in the summary judgment record as to whether this was permissible under Astra policy.

Bildman also points to evidence that he never instructed CareFree Travel to bill Astra for his personal or family vacations, nor did he instruct CareFree to overcharge Astra for company services in order to create excess balances to be used for personal vacations. See, e.g., 6/20/01 Bildman Affidavit ¶ 11; Dibenedetto Affidavit ¶¶ 1-5. However, Astra has presented evidence that it was billed for "Pre-President's Club" trips, trips immediately before "President's Club" trips to reward top sales representatives, which were in fact vacations for Bildman and his family and friends involving recreational activities not business. See, e.g., Bildman Deposition, Vol.1, pp. 1018-1021; Solvell Deposition, Vol. V, pp. 835-839; Wadsworth Deposition, Vol. I, pp. 122-129. In addition, although CareFree arranged numerous personal vacations for the Bildmans, it never billed them for any of these trips until after Bildman was suspended as CEO and President of Astra U.S.A. See Wadsworth Deposition, Vol. I, pp. 124-127. Accordingly, there is a factual dispute in the record with respect to the propriety of Bildman's vacations, precluding summary judgment.

Finally, Bildman contends that Astra has no evidence to support its allegation that German contractors improperly charged Astra for work done on his homes. He points to evidence that he was billed and paid German woodworking firm Eckart, Gmbh for goods and services provided at his homes and that he never instructed Eckart to charge Astra for any work related to his homes. See 6/30/01

Bildman Affidavit ¶ 8. Similarly, he was billed and paid for all goods and services provided by German stoneworking firm C&N Dankert Naturstein Gmbh and never instructed Dankert to charge Astra for any work related to his homes. See 6/30/01 Bildman Affidavit ¶ 9. However, Astra has proffered evidence that although Eckart and Dankert performed $300,000 to $500,000 of work on Bildman's residence at 99 Sargeant Road, Bildman has been unable in response to discovery requests to produce any evidence that he paid for such work. See, e.g., Wadsworth Deposition, pp. 103-104; McDonald Deposition, pp. 161-172. Further, there is evidence in the record that Bildman made himself the project manager for Astra construction projects involving the RX office and cafeteria and then billed work performed on his homes to these projects. See, e.g., Kennedy Deposition Vol. II, pp. 225-228; 258-260; Exhibits 43, 64 to Kennedy Deposition; Noyes Deposition, pp. 230, 296. Accordingly, there is a factual dispute in the record with respect to whether Bildman authorized German contractors to charge Astra improperly for work done on his homes.

ORDER

For the foregoing reasons, with respect to Civil Action No. 98-0580-C, it is hereby ORDERED that Astra's motion for summary judgment on Bildman's counterclaim is ALLOWED as to Counts IV, VI and VII and DENIED as to Counts I, II and III. It is further ORDERED that Bildman's cross-motion for summary judgment on Count I of his counterclaim is DENIED. Finally, it is ORDERED that Astra's motion for summary judgment on Count II of its complaint is DENIED and that Bildman's cross-

motion for partial summary judgment on Counts I, II, III and V of Astra's complaint is DENIED.

With respect to Civil Action No. 99-1942-G, it is hereby ORDERED that Mogren and Johanssons' motion for summary judgment are DENIED as to Count I of the complaint and ALLOWED as to Count II.

/s/ Margaret R. Hinkle
Margaret R. Hinkle
Justice of the Superior Court

DATED: October 29, 2001

**APPENDIX B**

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

---

SUPERIOR COURT CIVIL ACTIONS
No. 98-0580C & 99-1942G

---

ASTRA U.S.A., INC.

vs.

LARS P.E. BILDMAN,

vs.

HAKAN MOGREN and CARL - GUSTAF JOHANSSON

QUESTIONS FOR THE JURY

I. CLAIMS OF ASTRA U.S.A. INC., (hereafter referred to as "Astra") AGAINST LARS P.E. BILDMAN (hereafter referred to as "Mr. Bildman")

A. FRAUD

Q.1. Did Mr. Bildman defraud Astra?

YES ✓ NO ____

Q.2. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 875,512
AMOUNT IN NUMBERS

eight hundred seventy-five thousand five hundred twelve Dollars
AMOUNT IN WORDS

B. CONVERSION

Q.3. Did Mr. Bildman convert Astra funds for his personal benefit?

YES ✓ NO ___

Q.4. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 875,512
AMOUNT IN NUMBERS

eight hundred seventy-five thousand five hundred twelve Dollars
AMOUNT IN WORDS

C. WASTE

Q.5. Did Mr. Bildman waste the assets of Astra?

YES ✓ NO ___

Q.6. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

D. BREACH OF FIDUCIARY DUTY

Q.7. Did Mr. Bildman breach his fiduciary duty to Astra by making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose?

YES ✓ NO ___

Q.8. If your answer to the preceding question is "Yes", was Mr. Bildman's conduct a substantial factor in causing harm to Astra?

YES ✓ NO ____

Q.9. Did Mr. Bildman breach his fiduciary duty to Astra by improper use of Astra funds?

YES ✓ NO ____

Q.10. If your answer to the preceding question-is "Yes", was Mr. Bildman's conduct a substantial factor in causing harm to Astra?

YES ✓ NO ____

Q.11. If your answer to either or both questions 8 and 10 is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's breach of fiduciary duty?

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

Q.12. If you answered any two or more of questions 2, 4, 6 or 11, have you overlapped any damages you awarded Astra?

YES ✓ NO ____

Q.13. If your answer to the preceding question is "Yes", set forth the damages Astra is entitled to without any overlapping.

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

MISCELLANEOUS

Q.14. Did Mr. Bildman engage in sexual harassment at Astra?

YES ✓ NO ____

Q.14A. Did Mr. Bildman violate Astra's sexual harassment policy?

YES ✓ NO ____

Q.15. Did Mr. Bildman retaliate against any Astra employee who exercised his/her right to make a complaint under Astra's sexual harassment policy?

YES ✓ NO ____

II. CLAIM OF MR. BILDMAN AGAINST ASTRA

BREACH OF CONTRACT

Q.16. Did Astra breach the 1993 employment agreement in its termination of Mr. Bildman?

YES ____ NO ✓

Q.17. If the answer to the preceding question is "No", did Astra breach the 1993 employment agreement with regard to the profit sharing plan?

YES ____ NO ✓

Q.18. If your answer to question 16 or 17 is "Yes", what are the damages to which Mr. Bildman is entitled as a result of Astra's breach of contract?

$ 0
AMOUNT IN NUMBERS

_____ Dollars
AMOUNT IN WORDS

Q.19. At the time Astra terminated Mr. Bildman, did Astra have a reasonable good faith basis for believing Mr. Bildman had engaged in conduct justifying his termination "for cause" under the 1993 employment contract?

YES ✓ NO ____

Q.20. Did Mr. Bildman fraudulently induce Astra to enter into the March 1996 supplemental stock grant?

YES ____ NO ✓

Q.21. If your answer to the preceding question is "No", what amount of money is owed Mr. Bildman tinder the March 1996 supplemental stock grant?

$ 203,691
AMOUNT IN NUMBERS

two hundred three thousand six hundred ninety-one Dollars
AMOUNT IN WORDS

III. CLAIMS OF MR. BILDMAN AGAINST HAKAN MOGREN (hereafter referred to as "Dr. Mogren") & CARL-GUSTAF JOHANSSON (hereafter referred to as "Mr. Johansson")

INTENTIONAL INTERFERENCE WITH CONTRACT

Q.22. Did Dr. Mogren intentionally interfere with Mr. Bildman's employment contract with Astra?

YES ____ NO ✓

Q.23. If your answer to the preceding question is "Yes", what are the damages to which Mr. Bildman is entitled as a result of Dr. Mogren's conduct?

$_____
AMOUNT IN NUMBERS

_____Dollars
AMOUNT IN WORDS

Q.24. Did Mr. Johansson intentionally interfere with Mr. Bildman's employment contract with Astra?

YES ____ NO ✓

Q.25. If your answer to the preceding question is "Yes", what are the damages to which Mr. Wildman is entitled as a result of Mr. Johansson's conduct?

$_____
AMOUNT IN NUMBERS

_____Dollars
AMOUNT IN WORDS

I hereby certify that each question answered above was answered by at least 5/6 of the deliberating jurors.

/s/ Kaja K. Schuppert
Foreman

DATED: February 21, 2002

## APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.

[Filed January 8, 2010]

---

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT [CONSOLIDATED]
(Specially Assigned to Hinkle, J.)
C.A. No. 98-0580-C

---

ASTRA USA, INC.,
*Plaintiff*,

v.

LARS BILDMAN,
*Defendant*,

v.

HAKAN MOGREN, and CARL-GUSTAF JOHANSSON,
*Third-Party Defendants*,

---

C.A. No. 99-1942-G

---

LARS BILDMAN,
*Plaintiff*,

v.

HAKAN MOGREN, and CARL-GUSTAF JOHANSSON,
*Defendants*.

---

FINAL JUDGMENT AFTER RESCRIPT

These consolidated actions, having been tried before a jury, which duly delivered its verdict on special

questions, and the Court having rendered various pre-verdict and post-verdict orders, was appealed to the Supreme Judicial Court. The issues having been duly heard and the Supreme Judicial Court having issued a rescript, it is hereby Ordered and Adjudged that Final Judgment After Rescript shall enter in these consolidated cases as follows:

I. Liability On Claims, Counterclaims and Third-Party Claims

A. Plaintiff Astra USA, Inc.'s Claims Against Defendant Bildman (C.A. 98-0580).

1. Count I (Fraud) – Judgment shall enter in favor of Astra USA. Inc. ("Astra").

2. Count II (Breach of Fiduciary Duty and the Duties of Good Faith and Loyalty) – Judgment shall enter in favor of Astra.

3. Count III (Waste of Corporate Assets) – Judgment shall enter in favor of Astra.

4. Count IV (Rescission) – Judgment shall enter in favor of Lars Bildman.

5. Count V (Conversion) – Judgment shall enter in favor of Astra.

B. Plaintiff-In-Counterclaim Lars Bildman's Claims Against Defendant-In-Counterclaim Astra USA, Inc. (C.A. 98-0580).

7. Count I (Breach of Contract) – Judgment shall enter in favor of Astra.

8. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra.

9. Count III (Indemnification for Cost and Expenses Incurred in this Action) – Judgment shall enter in favor of Astra.

10. Count IV (Indemnification for Costs and Expenses Incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra.

11. Count V (Libel-Malice) – Judgment shall enter in favor of Astra.

12. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra.

13. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra.

C. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendants Häkan Mogren and Carl-Gustaf Johansson (C.A. 98-0580).

14. Count V (Libel-Malice) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

15. Count VI (Libel-Negligence) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

16. Count VII (Libel-Per Se) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

D. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendant Astra AB (C.A. 98-0580).

17. Count I (Breach of Contract) – Judgment shall enter in favor of Astra AB.

18. Count II (Fair Wage Practices) – Judgment shall enter in favor of AB.

19. Count III (Indemnification for Cost and Expenses Incurred in this Action) – Judgment shall enter in favor of Astra AB.

20. Count IV (Indemnification for Costs and Expenses incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra AB.

21. Count V (Libel-Malice) – Judgment shall enter in favor of Astra AB.

22. Count VI (Libel-Negligence). – Judgment shall enter in favor of Astra AB.

23. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra AB.

E. Plaintiff Lars Bildman's Claims Against Häkan Mogren and Carl Gustaf Johansson (CA. 994942).

24. Count I (Intentional Interference with Contractual Relations) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

25. Count II (Intentional Infliction of Emotional Distress) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

II. Damages And Equitable Relief

A. Supplemental Stock Grant

26. Judgment shall enter that Lars Bildman is entitled to recover from Astra the

amount of $203,691 under the March 1996 supplemental stock grant, subject to and limited by Astra's right of set-off discussed in § II(D) below.

B. Legal Fees

27. Judgment shall enter that Lars Bildman is not entitled to any of his legal fees, costs, or expenses in connection with these consolidated actions.

C. Award of Damages In Favor Of Astra And Against Lars Bildman

28. Mr. Bildman shall pay Astra the damages awarded by the jury in the amount of $1,040,812.00, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998.

29. Mr. Bildman shall forfeit the amount of $5,599,097 in compensation and $1,180,000 in bonuses paid to him during his employment by Astra. Accordingly, Mr. Bildman shall also pay Astra an additional $6,779,097.00, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998.

30. Judgment shall enter in favor of Lars Bildman on Astra's claims for punitive damages, investigatory costs, and additional compensatory damages.

D. Set-Off

31. Judgment shall enter that Astra may set off $203,691, the amount that Lars

Bildman is entitled to recover from Astra under the March 1996 supplemental stock grant, from the $7,819,909 in total damages that Astra is entitled to recover from Lars Bildman, as discussed in § II(C) above.

32. As a result of this set-off, judgment shall enter that Mr. Bildman shall pay Astra $7,616,218, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998 through January 4, 2010 in the amount of $10,875,959.30, totaling $18,492,177.30, with interest continuing to accrue at the rate of 12% per annum through and until the date of Mr. Bildman's full payment of this judgment.

So Ordered:

Dated at Boston, Suffolk County, this 6 day of January 2010.

/s/ Margaret R. Hinkle
By: , Asst. Clerk
Associate Justice

Entered on the Docket: January 8, 2010